A
COLLECTION AND ABRIDGEMENT
OF
CELEBRATED CRIMINAL TRIALS
IN SCOTLAND,
From A. D. 1536, to 1784.

WITH

HISTORICAL AND CRITICAL REMARKS.

BY

HUGO ARNOT, Esq. Advocate.

Quae scelerum facies, O virgo, effare, quibusve
Urgentur poenis? Quis tantus plangor ad auras?

EDINBURGH: PRINTED FOR THE AUTHOR;
BY WILLIAM SMELLIE.
M,DCC,LXXXV.

Entered in Stationers Hall.

B783957
246

L I S T

OF SUBSCRIBERS.

HIS ROYAL HIGHNESS THE PRINCE OF WALES.

A

His Gr. the Duke of Athole, 2 copies.
Right Hon. Earl of Abercorn.
Right Hon. Earl of Ailesbury.
Right Hon. Lord Apsley.
Pep. Arden, Esq; Attorn. Gen. of Eng.
The Faculty of Advocates.
Society of Antiquaries of Scotland.
Sir Ro. Anstruther of Balcaskie, Bart.
Ph. Anstruther Paterson of Eccles, Esq;
John Anstruther, Esq; Lincolns Inn.
John Anstruther, Esq; Advocate.
Charles Anderson Pelham, Esq;
Mr Fr. Anderson Writer to the Signet.
Mr James Anderson, Merchant, Leith.
Mr James Anderson, Writer, Dundee.
Alex. Abercromby, Esq; Advocate.
Mr A. Abercromby Writer to Signet.
Matthew Robert Arnott, Esq; Clerk of the House of Lords.
Mr Alex. Arnott, Mercht. Arbroath.
Mr Th. Adair Writer to the Signet.
Mr Alexander Adam, Kirkaldy.
Robert Vans Agnew, Esq;
Robert Alexander, Esq;
Roger Aytoun of Inchdernie, Esq;
Dr John Allan.
Mr Ro. Allan, Banker, Edinburgh.
Mr Colin Alison, Writer, Montrose.
Mr Jo. Alston, jun. Mercht. Glasgow.
Mr Alex. Annand Mercht. Aberdeen.
Captain Arbuthnot.
Mr Jo. Aiken, jun. Writer Dumfries.

B

His Grace the Duke of Buccleugh.
Her Grace the Duchess of Buccleugh.
Right Hon. Earl of Buchan.
Right Hon. Earl of Balcarras.
Right Hon. Countess of Balcarras.
Right Hon. Earl of Breadalbane.
Right Hon. Lord Ballenden.
Right Rev. Lord Bishop of Bangor.
Right Hon. Lord Visc. Beauchamp.
Hon. George Baillie of Jervieswood.
Alexander Baillie of Dochfour, Esq;
Mr Will. Baillie, Writer, Montrose.
Mr Robert Baillie Farmer at Kincraig.
George Bing, Esq;
Hon. James Burnet, Lord Monboddo.
Alexander Burnet, Esq; Advocate.
Mr Will. Burnet, Advocate, Aberdeen.
James Brodie of Brodie, Esq;
John Bethune of Kilconquhar, Esq; two copies.
William Bethune of Bleboe, Esq;
Robert Baird of Newbeath, Esq;
John Balfour of Balbirnie, Esq;

Andrew Balfour, Esq; Advocate.
Mr Elphingston Balfour Bookseller.
Mr Dav. Balfour, Farmer, Cairntown.
Thomas Barker, Esq; Newcastle.
Mr James Bartlet, Banker, Edin.
Mr Benjamin Barton, Glasgow.
Colonel Robert Ballingall, Dundee.
William Blair of Blair, Esq;
George Blair of Adamton, Esq;
Robert Blair, Esq; Advocate.
John Eras. Blacket, Esq; Newcastle.
Robert Berry, Esq; Cheswick.
A. Bisset, Esq; Compt. Cust. Montrose.
Mr Alex. Maxwell Bennet, Leith.
Claud Boswell, Esq; Advocate.
Bristol Library Society.
Richard Bright, Esq; Bristol.
William Bryce of Bowton, Esq;
Charles Brown, Esq; Advocate.
Robert Brown, Esq; Advocate.
Dr Brown, Physician, Newcastle.
Mr D. Brown, jun. Merch. Montrose.
Mr Ro. Brown, Rood-lane, London.
Mr John Brown, Mason, Glasgow.
Jo. Buchart, Esq; Capt. of the Navy.
Captain Brydone.
Captain Birrell, East India Company.
Mr R. Birrell, Kirkaldy.
Mr William Bell, Merchant, Leith.
Mr Charles Bell, Merchant, Leith.
Mr James Bell, Merchant, Arbroath.
Mr William Black, Writer, Brechin.
Mr Andrew Blane, Writer, Edin.
Mr John Brand, Mercht. Montrose.
Mr Colin Bruce Writer in Arbroath.
Mr Jo. Buchan, jun. Writer to Signet.
Mr Walter Burgie, Saltershall Court, London.
Mr Ja. Buchanan, Writer, Glasgow.
Mr Th. Buchanan, Writer, Glasgow.
Mr Edmund Butterworth, Writing-master, Edinburgh.

C

Most Hon. Marquis of Carmarthen, one of his Majesty's Principal Secretaries of State.
Right Hon. Earl of Crawfurd.
Right Hon. Earl of Cassillis.
Right Hon. Lord George Cavendish.
Right Hon. Lord Frederick Cavendish.
Right Hon. Lord John Cavendish.
Right Hon. Lord G. Hen. Cavendish.
Right Hon. Lord Cathcart.
Right Hon. Lady Dowager Colville.
Right Hon. Lady Elis. Cuningham.
Sir Wm. Cuninghame of Caprington.
Sir Will. Augustus Cuninghame of Livingstone, Bart.
Sir William Cuningham of Robertland, Bart.
Cunynghame of Craigens, Esq;
Cuningham of Thornton, Esq;
Captain John Cunninghame.
Mr T. Cunninghame.
Mr J. Cunninghame.
Sir David Carnegy of Southesk, Bart.
George Carnegy of Pittarrow, Esq;
James Carnegy Arbuthnot, jun. Esq; of Balnamoon.
Right Hon. Ilay Campbell, Lord Advocate, six copies.
Major Gen. John Fletcher Campbell.
Colonel Campbell of Blythswood.
Colonel Campbell of Monzie.
Charles Campbell of Barbreck, Esq;
Walter Campbell of Shawfield, Esq;
Lieut. Col. Alex. Campbell, 62d reg.
Major Arch. Campbell of Askomill.
Archibald Campbell, Esq; Advocate.

William Campbell, Esq; of Stonefield, Advocate.
John Campbell of Airds, Esq;
Mungo Campbell, Esq;
Duncan Campbell, Esq;
Dr Alexander Campbell, Calcutta.
James Campbell, Esq; Jamaica.
John Campbell, Esq; Charterhouse Square, London.
Mr Wm. Campbell, Writer to Signet.
Captain Callander.
Rev. Mr Alex. Cameron, Rector of the Scots College of Valladolid.
William Constable of Burton Constable, Esq;
Henry Cowper, Esq;
John Crewe, Esq;
Charles Crowle, Esq;
John Crawfurd of Auchinames, Esq;
Miss Crawford.
Ronald Crawford, Esq;
Thomas Crawfurd, Esq; Bristol.
Thomas Crawford, Esq; Cotham.
Colonel William Calderwood, 1st regiment of horse guards.
Robert Hodshon Cay, Esq; Advocate.
James Colquhoun, Esq; of Luss, Advocate.
Mr John Colhoun, Rood-lane.
Robert Colt, Esq; Advocate.
William Craig, Esq; Advocate.
Mr Wm. Creech, Bookseller, Edin.
Robert Cullen, Esq; Advocate.
George Currie, Esq; Advocate.
James Clerk, Esq; Advocate.
Mr David Clark Solicitor at Law.
Mr Thomas Cleghorn Coachmaker.
Mr James Cundell, Brewer, Leith.
James Cheape of Strathtyrum, Esq;
Mr Hugh Cheape, Merchant, Leith.
James Chaplin of Colliston, Esq;
James Coutts, Esq; of Montrose.
Nathaniel Cholmly, Esq; Howsham.
John Croft, Esq; York.
Captain John Cowe.
William Cochrane, Esq; of Gullen.
Mr And. Cassells, Shipmaster, Leith.
Mr Joseph Cauvin, Writer, Edin.
Mr James Chalmers, Perth.
Mr Alex. Christie, Mert. Montrose.
Mr W. Christie, jun. Mert. Montrose.
Mr Cun. Corbet, Glasgow.
Mr Cruikshank, one of the teachers of the High School Edin. 2 copies.
Mr James Cummyng Secretary to the Antiquarian Society.

D.

His Grace the Duke of Devonshire.
Her Gr. the Duchess of Devonshire.
Right Hon. Earl of Derby.
Right Hon. Earl of Denbigh.
Right Hon. Earl of Dumfries.
Right Hon. Countess of Dumfries.
Right Hon. Earl of Dalhousie.
Right Hon. Lady Charlotte Dundas.
Sir Thomas Dundas of Kerse, Bart. six copies.
Lady Dundas.
Colonel Thomas Dundas of Fingask.
Charles Dundas, Esq;
Right Hon. Robert Dundas of Arniston, Lord President of the Court of Session, two copies.
Right Hon. Henry Dundas of Melville, Treasurer of the Navy, Dean of Faculty of Advocates, six copies.
Robert Dundas, Esq; Solicitor General of Scotland, two copies.
Colonel Alexander Dundas.

Mr

Mr John Dundas, Writer to Signet.
Mr James Dundas, Writer, Edinb.
The Scots College of Douay.
Hon. Arthur Duff.
Mr Lauch. Duff, Writer to Signet.
~~Right~~ Hon. Sir David Dalrymple, Bart. Lord Hailes.
Sir Jo. Dalrymple of Cranſton, Bart. Baron of Exchequer.
Sir Hugh Dalrymple of North Berwick, Bart.
Captain Dalrymple.
James Dalrymple, Eſq;
Ja. Dalrymple of Orangefield, Eſq;
Sir Robert Darcy Hildyard, Bart.
Sir Alexander Don of Newton, Bart.
Archibald Douglas of Douglas, Eſq;
William Douglas of Bridgetoun, Eſq;
W. Danby, Eſq; High Sheriff of York.
James Durham of Largo, Eſq;
Ja. Dewar of Vogrie, Eſq; Advocate.
Mr F. Dewar, Surgeon, Edinburgh.
Alexander Duncan of St Ford, Eſq;
Dr And. Duncan, Phyſician, Edin.
Capt. Andrew Duncan, St Andrew's.
Mr Andrew Duncan, junior, Edin.
The Rev. Dr Alexander Duncan of Stonnywynd.
Mr Pat. Duncan, jun. Writer, Perth.
Michael Dorſet, Eſq; Bignore Park, Suſſex.
James Drummond, Eſq; Advocate.
Miſs Drummond, Coates.
John Drummond, Eſq; New Street, Spring Garden.
John Davidſon, Eſq; Depute-keeper of the Signet.
John Davidſon, Eſq; Newcaſtle.
Thomas Davidſon, Eſq; Newcaſtle.
Captain Dunbar.
Mr Wm. Dunbar, Writer to Signet.
Mr Ro. Donaldſon, Writer to Signet.
Mr Ja. Dunlop, Merchant, Glaſgow.
Mr John Dunlop, Mercht. Glaſgow.
Mr Ro. Dunlop, Mercht. Glaſgow.
Mr Ro. Dunmore, Mercht. Glaſgow.
Mr Ja. Denniſton, jun. Mer. Glaſgow.
Mr Jo. Durno, Advocate, Aberdeen.
Mr Al. Duthie, Advocate, Aberdeen.

E.

Right Hon. Earl of Eglinton, two Copies.
Right Hon. Lord Elphinſtone.
The City of Edinburgh, two copies.
The Univerſity of Edinburgh.
Right Hon. William Eden.
Hon. Henry Erſkine, Advocate.
Hon. Thomas Erſkine.
Sir James Erſkine, Bart. two copies.
Sir William Erſkine.
 Erſkine of Mar, Eſq;
 Erſkine of Cardroſs, Eſq;
Methven Erſkine of Cambo, Eſq;
J. Erſkine, Eſq; Advooate.
Dav. Erſkine, Eſq; Writer to Signet.
Hon. G. K. Elphinſtone.
Alex. Elphinſtone, Eſq; Advocate.
Tho. Eagle, Eſq; Park-ſtreet, Briſtol.
Mr Thomas Elder, Merchant, Edin.
Mr Ch. Elliot, Bookſeller.

F.

Right Hon. Earl Fitz-William. 6 Copies
Right Hon. Counteſs Fitz-William.
Hon. George Fitz-William.
Right Hon. Charles-James Fox.
Sir Ad. Ferguſon of Kilkerran, Bart.
George Ferguſon, Eſq; Advocate.
Wm. Ferguſon of Raith, Eſq; 3 copies.

Mrs

Mrs Ferguson of Raith.
James Ferguson of Pitfour, Esq;
Alexander Ferguson, Esq; Advocate.
Neil Ferguson, Esq; Advocate.
Sir William Forbes of Pitsligo, Bart.
William Forbes of Callender, Esq; two copies.
Capt. Jonathan Forbes, Newcastle.
Mr Alex. Forbes, Writer to Signet.
Mr Alex. Forbes, jun. Writer, Edin.
Tho. Fotheringham, Esq; of Powrie, two copies.
Col. Fotheringhame, 1st reg of Gds.
Mr Frederick Fotheringham, Writer to the Signet.
Mrs Fletcher of Ballinshoe.
Mr Arch. Fletcher Writer to Signet.
William Fullarton of Carstairs, Esq;
George Fullarton, Esq; Collector of the Customs, Leith.
Charles Fullarton of Kinnaber, Esq;
James Fullarton-Carnegie, Esq; Advocate.
Ar. Dingwall-Fordyce of Culsh, Esq;
Colin Falconer of Redhall, Esq;
William Fiddler of Carriston, Esq;
Rev. Mr Jo. Farquharson, Principal of the Scots College of Douay.
David Fife, Esq; Drumgight.
William Farquharson, Esq; Advocate.
Alex. Fraser, Esq; Staples Inn.
Mr Wm. Fleming, Mercht. Glasgow.
Mr William Fettes, Merchant, Edin.
Mr Will. Ford, Merchant, Montrose.

G

Most Hon. Marquiss of Grahame.
Right Hon. Earl of Glencairn, three copies.
Right Hon. Countess of Glencairn.
Right Hon. Earl Gower, Lord Privy Seal.
Right Hon. Lord Gray.
The University of Glasgow.
Right Hon. William Grenville.
Hon. A. Gordon, Lord Rockville.
Hon. Baron Gordon.
George Gordon, Esq; Advocate.
Hon. Francis Garden, Lord Gardenston, three copies.
James Gardyne of Middleton, Esq;
Right Rev. Doctor John Geddes.
Robert Graham of Fintry, Esq;
Robert Graham of Gartmore, Esq;
John Graham of Meiklewood, Esq;
George Graham of Flemington, Esq;
James Graham of Meathie, Esq;
Mr Arch. Graham, Mercht. Glasgow.
Mr Th. Graham, Writer, Glasgow.
Mr Wal. Graham, Mercht. Glasgow.
John Guthrie of Guthrie, Esq;
James Guthrie of Craigie, Esq;
Mr Harie Guthrie, jun. Writer, Edin.
Henry Glasford, Esq;
Dr Dav. Goodsir, Physician, Leven.
Colonel Grant of Moy.
James Grant of Corrimonie, Esq; Advocate.
William Grant, Esq; Advocate.
Mr John Grant, Merchant, Leith.
Mr Alexander Greig, Montrose.
Mr James Greig, Writer, Edin.
John Gregson, Esq; Stoneridge.
Mr James Gray, Writer, Edin.
Mr Robert Gray, Solicitor at law.
Capt. Th. Gilfillan, late 71st reg.
Mr A. Gardiner, Mercht. Montrose.
Mr John Gillies Dalnotter.
Mr Colin Gillies, Merchant, Brechin.
Mr Ad. Glegg, Merchant, Montrose.

Mr John Grieve, Merchant, Edin.
Mr Ch. Grierson, Mercht. Glasgow.

H

His Grace the Duke of Hamilton.
Right Hon. Earl of Hadington
Right Hon. Earl of Hyndford.
Right Hon. Earl of Hopetoun, three copies.
Right Hon. Lord Hawke, 2 copies.
Right Hon. Lord Harrowby.
Right Hon. Lord Haddo.
Hon. Capt. Ro. Hamilton-Lindsay.
William Hamilton of Wishaw, Esq;
Alex. Hamilton, Esq; Advocate.
Dr Alex. Hamilton, Physician, Edin.
Dr Ja. Hamilton, Physician, Edin.
Capt. James Hamilton of Broomhill.
Mr William Hamilton Upholsterer.
Mr Ja. Hamilton Shipmaster, Leith.
Hon. Ch. Hope-Weir of Craigiehall.
Charles Hope, Esq; Advocate.
Right Hon. James Hunter-Blair, Lord Provost of Edinburgh.
Charles Hunter of Burnside, Esq;
Robert Hunter of Thurston, Esq;
Dr James Hunter Physician.
Sir John Halket of Pitfirran, Bart.
Mr John Halket Rector of the Grammar School St Andrews.
Sir John Henderson of Fordell, Bart.
Robert Henderson, Esq; Advocate.
Matthew Henderson, Esq;
Mr John Henderson Architect.
Mr William Henderson Glasgow.
John Hay of Leys, Esq;
Charles Hay, Esq; Advocate.
Mr James Hay junior, Writer.
Joseph Harford, Esq; Dughton Street, Bristol.
James Heggie of Pitlessie, Esq;
George Home of Argaty, Esq;
David Home, Esq; Advocate.
Mr Ja. Home Writer to the Signet.
G. Buchan-Hepburn, Esq; Advocate.
James Hepburn, Esq;
Roger Hog of Newliston, Esq;
William Honyman, Esq; Advocate.
Rev. Doctor Henry.
Mr Will. Haggart, Merchant, Leith.
Mr Hawkswell, Chamberl. of Bristol.
Mr James Hardie Writer, Edin.
Mr Ja. Horn Writer to the Signet.
Lieut. Will. Horn, late of 77th Reg.
Mr Ja. Hughes, Attor. at Law, Bristol.
Mr David Hutchison, Writer, Glas.
Mr Thomas Hopkirk, Glasgow.

I

Robert Jamieson, Esq;
Mr Jo. Jameson, jun. Mercht. Leith.
Dr Ro. Jameson, Physician, Jamaica.
Mr Henry Jameson, Banker, Edin.
Adam Inglis, Esq, Advocate.
Gilbert Innes of Stowe, Esq;
Mr Cha. Innes Writer to the Signet.
James Irvine of Kingcousie, Esq;
John Irvine, Esq; Temple, London.
Mr Will. Ingram, Mercht. Glasgow.
Mr John Johnston Farmer at Crudie.

K

Right Hon. Earl of Kelly.
Right Hon. Earl of Kinnoul.
Right Hon. Earl of Kintore.
Right Hon. Lord King.
F. Kinloch, Esq; young. of Gilmerton.
John Kinloch of Kilrie, Esq;
Thomas Kennedy of Dunure, Esq;
Kerr of Blackshiells, Esq;
Mr William Kerr, sen. Mercht. Leith.

Jo.

Jo. Keith, Esq; Col. Cust. Montrose.
Mr H. King, Iron-monger, Bristol.

L

Most Hon. Marquis of Lansdown, two copies.
Right Hon. Earl of Lauderdale.
Right Hon. Earl of Loudoun.
Right Hon. Lord Loughborough, Lord Chief Justice of the Court of Common Pleas, two copies.
Right Rev. Lord Bishop of Landaff.
Hon. Major Gen. Alexander Leslie.
Hon. Captain Leslie.
John Leslie, Esq; Buckingham Street.
Mr Wm. Leslie Writer to the Signet.
Joseph Liddel of Moorhouse, Esq;
Henry Lindsay, Esq;
Patrick Lindsay, Esq;
Mr James Lindsay, Merchant, Leith.
William Charles Little of Liberton, Esq; Advocate.
Thomas Lithan, Esq;
Dudley Long, Esq;
James Lumsden of Innergellie, Esq;
Mr William Lumsdaine, Writer, Edin.
Robert Low of Clatto, Esq;
George Lowden, Esq; Elm Tree Court, Temple.
Charles Lyell of Kinnordie, Esq;
Stewart Lyell of Dickmountlaw, Esq;
Mr Alex. Laing, Mason, Edinburgh.

M

His Grace the Duke of Montrose.
His Grace the Duke of Montague, Master of Horse to his Majesty.
Right Hon. Earl of Morton.
Right Hon. Earl of Moray.
Right Hon. Lord Middleton.
Right Hon. Lord Mounstuart.
Right Hon. Lord Maitland.
Right Hon. Lord Mulgrave.
Archibald M'Donald, Esq; Solicitor General of England.
Colonel John M'Donell.
Arch. M'Donald, Esq; Advocate.
Mr Wm. M'Donald Writer to Signet.
Mr Alex. M'Donald Writer to Signet.
Hon. A. Murray, Lord Henderland.
Alex. Murray of Blackbarony, Esq;
Moray of Abercairney, Esq;
Anthony Murray of Crieff, Esq;
James Wolfe Murray, Esq; Advocate.
Mr Ja. Murray, Sheriff-clerk, Perth.
Sir Will. Maxwell of Monreith, Bart.
Wm. Maxwell of Calderwood, Esq;
Lieutenant-Colonel Maxwell.
Mr Archibald Maxwell, Writer, Edin.
Sir William Morres, Bart.
Sir Th. Moncreiffe of Moncreiffe, Bart.
Dr Wil. Moncrieff, Physician, Bristol.
Fred. Humberstone Mackenzie of Seaforth, Esq;
Geo. M'Kenzie of Inchcoulter, Esq;
Cap. Alex. Mackenzie, 73d regim.
A. Muir Mackenzie, Esq;
John M'Kenzie, Esq; Advocate.
John M'Kenzie, Esq; Temple.
William M'Dowall of Castlesemple, Esq; two copies.
Mr M'Dougall.
Mr Alex. M'Dougall, Surgeon, Edin.
Angus M'Alister of Loup, Esq;
Char. M'Kinnon of M'Kinnon, Esq;
Capt. M'Kinnon, 36d Regiment.
Colonel Monypenny of Pitmillie.
William Mure of Caldwell, Esq;
Will. Miller, Esq; of Barskimming, Advocate.
John Miller, Esq; junior, Advocate.

John Miller, Esq; Advocate, Professor of Law, Glasgow.
Alexander Miller, Esq; Advocate.
Captain William Miller of Pourin.
Mr Patrick Miller, Banker, Edin.
Mr Pat. Miller, Town-clerk, Perth.
Mr James Mercer, Writer, Edin.
Major John Melville of Murdochcairnie.
James Mill of Old Montrose, Esq;
Hercules Mill, Esq;
David Mill, Esq; of Carnoustie.
David Mill, Esq;
Capt. James Milne, 27th regiment.
Archibald M'Niell of Colinsay, Esq;
Captain J. Maitland of Eccles.
James Macrae, Esq;
Gilbert Meason, Esq; two copies.
Hugh Mosman, Esq;
Donald M'Leod of Geanies, Esq;
B. W. M'Leod, Esq; Advocate.
John M'Laurin, Esq; Advocate.
Allan M'Conochie, Esq; Advocate.
Alex. More, Esq; Advocate.
William M'Intosh, Esq; Advocate.
Henry Moubray, Esq;
Vaun Montgomery, Esq; Dublin.
Rev. Dr James Moffat, Newlands.
Dr Jo. Mudie, Physician, Montrose.
James Morison of Naughton, Esq;
Mr James Morison, jun. Mer. Leith.
George Moir of Scotstown, Esq;
Dundas M'Queen, Esq; Advocate.
Mr George M'Queen, Collector of Cess for Edinburgh.
Mr James Mansfield, Banker, Edin.
Mr Sam. Mitchelson, Writer Signet.
Mr Sam. Mitchelson, jun. Writer to Signet.
John M'Gowan, Esq;
James Marr of Whitefield, Esq;
Mr David Martin, Painter.
Mr Ellis Martin, Merchant, Leith.
Mr Dav. Mitchell, Mer. Gottenburgh.
Mr William Mitchell, Mer. Leith.
Mr James Mitchell, Mer. Leith.
George Middleton, Esq; Comptroller of the Customs, Leith.
Jo. Molison, Esq; Provost of Brechin.
Mr Alex. Menzies, Clerk of Session.
Mr Tho. Mawer, Writer, Dundee.
Mr Will. M'Killop, Writer, Edinb.
Mr Alexander Mathieson.
Mr James Murdoch, jun. Glasgow.
Mr Peter Murdoch, Merc. Glasgow.
Mr James M'Nair, Shettleston.

N.

Right Hon. Earl of Northington.
William Nairn, Esq; Advocate.
Mr Alexander Nairne, Writer, Edin.
Henry Ivie-Nicolson of Glenbervie, Esq;
Mr Alex. Neilson, Solicitor at Law.
Mr Walter Neilson, Glasgow.
Mr Will. Neish, Farmer at Unthank.

O

Hon. Walter Ogilvy of Clova.
Adam Ogilvie, Esq; Advocate.
George Ogilvy, Esq; Montrose.
Mr John Ogilvie, Writer, Montrose.
Mr David Ogilvy, Merchant, Leith.
James-Townshend Oswald of Dunnikier, Esq;
Mrs Oswald of Dunikier.
Mr Geo. Oswald, Merch. Glasgow.
Mr Ja. Oswald, Merchant, Glasgow.
Mr Alex. Oswald, Mercht. Glasgow.
William Oliphant, Esq;

Robert

Robert Oliphant of Roſſie, Eſq; Poſt Maſter General of Scotland.
John Orr of Barrowfield, Eſq;
Patrick Orr of Bridgetoun, Eſq;
Robert Auchterlony, Eſq; Montroſe.

P.

His Grace the Duke of Portland.
Her Grace the Ducheſs of Portland.
Right Hon. William Pitt, Firſt Lord of the Treaſury, Chancellor of the Exchequer.
The Scots College of Paris.
Right Hon. John Jelf Pratt.
Sir James Pringle of Stitchel, Bart.
Alex. Pringle of White Bank, Eſq;
John Pringle, Eſq; Advocate.
Geo. Paterſon of Caſtle-Huntly, Eſq;
John Paterſon of Caſtlehill, Eſq;
William Paterſon of Braehead, Eſq;
Mr Alex. Paterſon, junior, Merch. Montroſe.
Andrew Plummer, Eſq; Advocate.
John Peebles, Eſq; Irvine.
Nathaniel Punſhon, Eſq; Newcaſtle.
Charles Partridge, Eſq; Cotham.
Mr John Playfair, Profeſſor of Mathematicks, Edinburgh.
Mr John Patiſon, Writer, Leith.
Mr Rich. Prentice, Solicitor at Law.
Mr James Pillans, Merchant, Leith.
Mr Patrick Proctor, Glammis Caſtle.
Mr Will. Pirnie, Maſon, Edinburgh.

R.

His Grace the Duke of Roxburgh.
Right Hon. Lord Rawdon.
Sir Alex. Ramſay-Irvine of Balmain, Bart.
James Ramſay, Eſq; Ramſay-Lodge.
Capt. A. Ramſay, George's Square.
Mr William Ramſay, Banker, Edin.
Mr Peter Ramſay, Stabler, Edin.
Mr David Ramſay, Printer, Edin.
Mr Ro. Ramſay, junior, Mer. Leith.
Hon. David Roſs, Lord Ankerville.
Hugh Roſs of Kerſe, Eſq;
George Roſs, Eſq; London.
Gilb. Roſs, Eſq; Billiter Lane, Lond.
Gilb. Roſs, Eſq; junior, Billiter Lane.
Matthew Roſs, Eſq; Advocate.
Wil. Roſs, Eſq; Lincoln's Inn, Lond.
Hercules Roſs of Roſſie, Eſq;
Mr Walter Roſs, Writer to Signet.
Mr James Roſs, Writer, Perth.
Mr William Roſs, Mer. Montroſe.
Mr Hugh Roſs of Philadelphia.
Geo. Roſe, Eſq; Sec. to Treaſury.
Hon. David Rae, Lord Eſkgrove.
David Rae, Eſq;
Mr John Rae, Surgeon.
Lieut. Gen. James Robertſon of Newbigging.
William Robertſon, Eſq; Advocate.
William Robertſon, Eſq; Richmond, Surrey.
William Robertſon, Eſq;
Archibald Robertſon, Eſq; Advocate.
Mr Har. Robertſon, Mer. Glaſgow.
Mr James Robertſon of Montroſe.
Mr George Robertſon, Mer. Leith.
Mr Hugh Robertſon, Writer, Edin.
Mr Char. Robertſon, Painter, Edin.
Mr William Robertſon, Glaſgow.
T. Milles Riddle, Eſq; of Ardnamurchan.
Jacob Reidhall, Eſq; Briſtol.
David Reid, Eſq; Commiſſioner of the Cuſtoms.
Francis Ruſſel, Eſq; Advocate.

Mr Jo. Ruſſel, jun. Writer to Signet.
Mr Hen. Ruſſel, Writer, Dumblane.
Adam Rolland, Eſq; Advocate.
Robert Rolland, Eſq; at Auchmithie.
P. Rigg of Downfield, Eſq;
Dr Dan. Rutherford, Phyſician, Edin.
Mr J. Rutherford, Writer to Signet.
Andrew Rutherford, Eſq; Kirkcaldy.
John Rutherford, Eſq;
Mr J. Rutherford, jun. Writer, Perth.
Mr Ro. Rutherford, Writer, Perth.
Lieut. Rotheram, Royal Navy, Newcaſtle on Tyne.
Mr James Rennie, Merchant, Leith.
Mr James Renny, Merchant, Leith.
Mr Tho. Rennie, Writer to Signet.
Mr Thomas Rattray, Writer.
Mr Alex. Ritchie, Writer, Brechin.
Captain Robert Robb, Leith.

S

Right Hon. Counteſs of Sutherland.
Right Hon. Earl of Selkirk.
Right Hon. Earl Spencer.
Right Hon. Lord Viſcount Sackville.
Right Hon. Lord Robert Spencer.
Right Hon. Lord Salton.
Right Hon. Lord Scarſdale.
Honourable General Stuart.
Honourable Major James Stuart.
Hon. Colonel James-Stuart Montaque, two copies.
Hon. Baron Stewart-Moncrieff.
John Stewart, Eſq; of Allanbank.
Mrs Stewart of Allanbank.
Jo. Shaw-Stewart, Eſq; of Greenock.
An. Stuart, Eſq; Berkley Square.
Mr Dugald Stewart, Profeſſor of Moral Philoſophy, Edinburgh.
Mr Dan. Stewart Purſer in the Navy.
Mr Thomas Stewart Town-clerk of Montroſe.
Univerſity of St Andrews, 2 copies.
Rev. Mr Joſeph Shepherd, Rector of the Engliſh College of Valladolid.
Sir John Sinclair Bart. of Murkle.
Colonel Sinclair of Sinclair, 2 copies.
Robert Sinclair, Eſq; Advocate.
William Sinclair Wemyſs of South Dun, Eſq;
Sir John Scot, Bart.
John Scot, Eſq, of Malleny,
Robert Scot of Logie, Eſq;
Will. Scot, Eſq; Capt. of the Navy.
Mr Tho. Scot Writer to the Signet.
Mr William Scot Banker, Edin.
Mr Ro. Scott Merchant, Glaſgow.
Mr Will. Scott Farmer at Gilchorn.
Hon. John Swinton, Lord Swinton.
Sir Henry Seton, Baronet.
Hugh Seton of Touch, Eſq;
Lieut. Gen. Ro. Skene of Hallyards.
Geo. Skene of Skene, Eſq; 2 copies.
Adam Smith, L. L. D.
Alexander Smith of Roſebank, Eſq;
Mr Donald Smith Banker, Edin.
Mr John Smith Merchant, Brechin.
Tho. Steele Eſq; Sec. to Treaſury.
Dr Nathan Spens Phyſician, Edin.
Jo. Spence, Eſq; Commiſ. of Brechin.
William Stirling of Ardoch, Eſq;
Mr James Stirling Banker, Edin.
Mr And. Stirling Merchant, Glaſgow.
Mr Walter Stirling Merchant, Glaſ.
Mr Walter Stirling Glaſgow.
Patrick Stirling of Pitendrich, Eſq;
Mr Jo. Stirling Merchant, Glaſgow.
William Strahan, Eſq; his Majeſty's Printer.
Alexander Strachan of Tarrie, Eſq;

Joseph Straton of Kirkſide, Eſq;
Archibald Speirs of Elderſlie, Eſq;
Peter Speirs of Culcrench, Eſq;
Wal. Sime, Eſq; Col. Cuſt. Aberdeen.
Mr John Sime Capenter, Leith.
Capt. Tho. Symes of the Marines.
David Simpſon, Eſq;
Mr Will. Simpſon, Royal Bank.
The Rev. Dr Small, Dundee.
Mr William Small Writer, Perth.
John Spottiſwood, Eſq; London.
Mr Char. Sibbald Mer. St Andrews.
Mr Will. Sibbald Merchant, Leith.
Dr John Stark Phyſician, Edinburgh.
Mr Henry Stark, Edinburgh.
Mr Will. Sprott Sollicitor at Law.
Mr Jo. Sievwright, Writer Brechin.
Mr James Stormonth Writer, Edin.
Mr Alex. Sherieff Merchant, Leith.
Mr Tho. Stodart, Merchant, Leith.
Mr Alex. Sommervail Mer. Leith.
Mr Thomas Sellar Writer, Elgin.

T

Right Hon. Lord Thurlow, Lord Chancellor.
Colonel John Thomſon of Charlton.
Capt. Thomſon 69th Regiment.
Mr Ja. Thomſon Inſ. Broker, Edin.
Mr Ja. Thomſon Farmer, Leuchland.
P. M. Threepland, Eſq; Advocate.
Alex. Fraſer Tytler, Eſq; Advocate.
Ja. Trail of Hobbiſter, Eſq; Advocate.
William Tait, Eſq; Advocate.
Mr William Tait Surgeon, Ely.
Rev. Alexander Turnbull of Caſſondonald, L. L. D.
Mr James Turnbull Glaſgow.
Mr James Torry Merchant, Edin.
Mr Will. Trotter, Merchant, Edin.
Mr Ro. Tennent Sollicitor at Law.
Mr Arch. Tombs Shipbuilder, Briſtol.

U

Right Hon. Earl of Uxbridge.
Right Hon. Earl of Upper Oſſery.
John Ure, Eſq; Provoſt of Forfar.

V

The Scots College of Valladolid.
Hon. James Veitch, Lord Elliock, two copies.

W

Right Hon. Earl of Weſtmoreland.
Right Hon. Lord Walſingham.
Sir John Whitefoord, Bart.
Sir Jo. Wedderburn of Balindean, Bart.
Society of Writers to the Signet.
Charles Watſon of Saughton, Eſq;
Alex. Watſon of Glentarchy, Eſq;
Alexander Watſon of Turin, Eſq;
Mr David Watt Farmer, Bankhead.
Rev. John Whitaker, B. D.
Tho. Wharton, Eſq; Commiſ. Cuſt.
Alexander Wight, Eſq; Advocate.
George Wallace, Eſq; Advocate.
William Wallace, Eſq; Advocate, Profeſſor of Scots Law, Edin.
Mr Alex. Wallace Banker, Edin.
John Whyte of Bennochie, Eſq; Advocate.
Robert White, Eſq; Kirkaldy.
Thomas White, Eſq; Retford, Nottingham ſhire.
William Wemyſs of Cuttlehill, Eſq;
Robert Wright, Eſq;
Rev. Mr James Wilſon, Marytoun.
Mr Charles Wilſone Surgeon, Glaſ.

Mr Jo. Wauchope Writer to Signet.
Mr Alex. Wood Surgeon, Edin.
Mr Andrew Wood Surgeon, Edin.
Mr And. Wardrope Surgeon, Edin.
Mr Ja. Webster Town-clerk of Forfar.
Mr Nathaniel Windey, Attorney at Law, Bristol.

Y

Philip York, Esq; New Cavendish Street.
James Yeaman of Murie, Esq;
J. Read Yeaman of Auchinleck, Esq;
Mr Alex. Young Writer, Edin.
Mr Ed. Young Sol. at Law, Edin.
Ga. Young, Esq; Budgerow, Lond.

Of the AUTHOR may be had, and of W. CREECH Edinburgh, and T. CADELL, and T. LONGMAN, London, price in boards L. 1 : 1 : 0, a few copies of the History of Edinburgh, by HUGO ARNOT, Esq; Advocate,—This work contains *inter alia*, an account of the most remarkable public transactions in Scotland, from the *Reformation* to the *Rebellion* 1745,—Of the Manners of the antient Scots, their Dress and Table, Houses and Furniture—Of Religious Ceremonies, Public Diversions, and Private Amusements—Of the Art of Printing, and Discovery of Coal—Of the Legislative and Judicative Assemblies—Of the University, Public Buildings, and Religious Houses—Of Arts and Manufactures—Also a Dissertation on the antient Scottish Musick; and a Table of the Prices of Provisions, from A. D. 1000 to the present times; and Specimens of the Tables of the Great, &c. &c. &c.

PREFACE.

P R E F A C E.

THE Criminal Records of a Country are an hiſtorical monument of the ideas of a People, of their manners and juriſprudence: And in the days of ignorance and barbariſm, they exhibit a ſtriking, but hideous picture of human nature. The records of Scotland, in particular, preſent ſuch a frequent diſplay of the extravagance of the human mind, as amuſes the fancy after the weariſome detail of form, and the diſguſting repreſentation of guilt.

While thoſe materials gratify curioſity, they alſo afford uſeful information. They ſhow what bitter fruits are produced under the gloomy climate of a tyrannical Government, and a ſuperſtitious Prieſthood; and they afford us ample ground of conſolation, when we compare thoſe bitter fruits with the bleſſings which we enjoy under a free government, and in an enlightened age.

To preſent theſe trials unabridged, would be to fatigue the reader with tedious rubbiſh; and to deliver them without illuſtration or remark, would be to deprive them of that fund of entertainment and information which they ought to poſſeſs. But the manner in which I thought it adviſeable to publiſh them has laid me

under

under certain disadvantages, viz. the necessity of delivering my own opinion upon a variety of difficult and important cases; and of undergoing no inconsiderable degree of labour.

In the course however of my search, into voluminous, obscure, and mutilated Records, I derived great benefit and satisfaction, from the polite and chearful assistance afforded me, by the Gentlemen in all the Publick Offices which I had occasion to consult; and in particular from that of Mr NORRIS, *Depute Clerk of Justiciary, and of the Messrs* ROBERTSONS, *Keepers of the Records in the General Register, whose judicious and liberal aid greatly alleviated the trouble of my work. And if it shall be honoured with the publick approbation, I shall think myself amply recompensed for the toil of a long and laborious research.*

EDINBURGH, AUGUST 1.
1785.

CONTENTS.

TREASON.

Page

Trial of John Master of Forbess, for conspiring to assassinate King James V. for exciting a mutiny in the King's host, and for attempting to sacrifice part of the army to the English 1

Mr Archibald Douglass, Parson of Glasgow, for the treasonable murder of Henry King of Scots - - 7

John Earl of Gowry, and Mr Alexander Ruthven, for conspiring to bereave his Majesty of life at St Johnston, 5th August 1600. - - - - 20

Robert Logan of Restalrig for accession to Gowry's conspiracy 46

Francis Tennent, merchant-burgess of Edinburgh, for writing a seditious Pasquinade against the King - - 61

Archibald Cornwall, town-officer in Edinburgh, for attempting to hang up the King's Picture on the gallows - 63

Doom pronounced over the dead body of Francis Mowbray, a prisoner, who was killed in his attempt to escape from Edinburgh Castle - - - - - - 65

Trial of Mr Andrew Crichton for declining the authority of the King and Privy Council - - - - - 67

John Fleming for slanderous speeches against the King - 69

Thomas Rois, son of the late John Rois of Craigie, for writing and publishing at Oxford, a Pasquinade against the Scots - - - - - - - - 70

James Skene for treasonable opinions and declarations - 73

Charles Lord Fraser for high treason, in proclaiming the late King James to be righteous and lawful Sovereign of this realm, &c. - - - - - 75

Page

Captain Simon Fraser of Beaufort, and many other persons, mostly of the clan Fraser, for high treason, in forming unlawful associations, collecting an armed force, occupying and fortifying houses and garrisons, imprisoning and ravishing persons of distinguished rank, and continuing in arms after being charged by a herald to lay them down - 79

Mr John Thomson and Charles Auchmouty, servants to the African Company, for treason and leasing-making, by designing, and causing to be engraved, a Political Print - 91

Archibald Macdonald, son to Coll Macdonald of Barisdale, as attainted of high treason - - - - 100

LEASING-MAKING.

Trial of Mr John Stewart commissary of Dunkeld, son to Mr James Stewart of Ladywell, for leasing-making against the Earl of Argyle, and fabricating and uttering lies and calumnies contrary to law - - - - 121

John Niven, Captain of the ship Fortune of London, for leasing-making against James Duke of Albany and York - 126

PARRICIDE.

John Dickson for the murder of his Father - - 129

MURDER.

Thomas Armstrong for the murder of Sir John Carmichael of that Ilk, Warden of the West Marches - - 130

Alister

Page

Alister Macgregor of Glenstra, Laird of Macgregor, for slaughtering the Laird of Luss's friends, and plundering his lands - - - - - 133

Patrick Roy Macgregor for theft, sorning, wilful fire-raising, robbery, and murder - - - 136

Agnes Johnston for the murder of —— Lamb, a child - 138

Andrew Rutherfoord of Townhead for the murder of James Douglass, brother to Sir William Douglass of Cavers - 140

George Clerk and John Ramsay, for the murder of John Anderson merchant in Edinburgh - - - 142

James Gray litster in Dalkeith, for the murder of Archibald Murray, gentleman of his Majesty's troop of guards - 146

John Chislie of Dalry for the murder of the Right Hon. Sir George Lockhart of Carnwath, Lord President of the Court of Session, and member of his Majesty's Privy Council - 150

John Master of Tarbet, Ensign Andrew Mowat, and James Sinclair writer in Edinburgh, for the murder of Elias Poiret, Sieur de la Roche - - - - 156

John Gillespie merchant in Glasgow, John Anderson of Dovehill, and Robert Stevenson glazier in Glasgow, for the murder of Major James Menzies. - - - 163

George Cumming writer in Edinburgh, for the murder of Patrick Falconer soldier in Lord Lindesay's regiment - 169

James Carnegie of Finhaven for the murder of Charles Earl of Strathmore - - - - - - - - 178

James Stewart in Aucharn for the murder of Colin Campbell of Glenure - . . - - - - - - 192

Malcolm M'Gregor, alias John Grant, for the murder of John Stewart, both of the parish of Glengairn, in Aberdeenshire. —Doctrine of prescription of crimes established - 229

OF TUMULT WITHIN BURGH.

Page

David Mowbray shoemaker, for exciting a tumult in the city of Edinburgh, and rescuing a baker whom the hangman was whipping through the Canongate by order of the Magistrates - - - - - 239

OF PIRACY.

Trial of Captain Thomas Green, commander of the Worcester, a ship belonging to the English East India Company, and of fourteen of his crew, for Piracy and Murder, committed on a ship and its crew on the coast of Malabar - 248

John Maciver and Archibald Macallum, merchants in Greenock, for sinking and casting away of ships, and piratically relanding and selling their cargoes, after entry in the Customhouse, for the purpose of defrauding the underwriters and the revenue - - - - - 262

OF FORGERY.

Mr George Henderson merchant in Edinburgh, and Margaret Nisbet, wife of Alexander Macleod wigmaker in Leith, for forging a bill upon the Duchess of Gordon - - 282

OF BREAKING OF GARDENS.

John Rait and Alexander Dean for breaking of gardens - 305

OF

OF INCEST.

Page
Alexander Blair taylor in Currie - - - 306
James Wilson coal grieve at Bonhard - - ibid.
William Drysdale and Barbara Tannahill - - 307

OF ADULTERY.

John Guthrie for notour, i. e. *notorious Adultery* - 312
Patrick Robertson and Marion Kempt for Adultery - 313
John Fraser writer in Edinburgh for Adultery - 314
Margaret Haitly for Adultery - - - - 317
John Murdoch and Janet Douglas for Adultery - 318

OF FORNICATION.

Christopher Little and Margaret Jameson for fornication and theft, charged against them in one indictment - 320

OF BLASPHEMY.

Thomas Aikenhead for denying the Trinity, and the authority of the Scriptures, and for maintaining the eternity of the World - - - - - - - 322

OF

OF OTHER CRIMES AGAINST RELIGION AND THE STATE.

Page

Trial of John Ogilvie, Jesuit, for saying of Mass, acknowledging the Pope to be judge in controversies of Religion, and declining to answer certain questions put by his Majesty's Commissioners, concerning the Pope's power to excommunicate Kings, the murder of a King excommunicated and deposed by the Pope, and a Subject's being absolved from the allegiance due to such a King - - 328

Mr John Wallace for saying of Mass, being habit and repute a Popish Priest, and refusing to take the formula - 335

Sir James Ker for celebrating clandestine and irregular marriage - - - - - - - 337

John Connochar for celebrating clandestine and irregular marriage - - - - - - - 339

Mr Daniel Taylor, and twenty-four other preachers of the Episcopal communion in Edinburgh, Mr Arthur Miller preacher in Leith, and Mr Robert Colt, and Mr James Hunter, Musselburgh, for preaching to an Episcopal congregation without letters of orders from a Protestant Bishop, and without praying for King George by name - 343

WITCHCRAFT.

Alison Pearson - - - - - 347

Janet Grant and Janet Clerk - - - 348

John Cunninghame - - - - ibid.

Agnes Sampson - - - - - 349

Euphan M'Calzeane - - - - 350

Page
Patrick Lawrie - - - - 351
Margaret Wallace - - - ibid.
Isobel Young - - - - 353
Alexander Hamilton - - - 356
John Neil - - - - 357
Janet Brown, and others - - - ibid.
Major Weir - - - - - 359
Isobel Elliot and nine other women - - - 360
Impostor of Bargarran - - - - 361
CONCLUSION - - - - 371

APPENDIX.

No. I. *Supersedere, or personal protection from arrest, granted to John Earl of Gowrie, June 20. 1600* - - 373
No. II. *Excerpts from the 'Summondis of Treassoun' against Robert Logane, eldest sone to Robert Logane, sumtyme of Restalrig, and his tutors and curators, on account of the said deceast Robert Logan's accession to the E. of Gowrie's conspiracy* - - - - 375
No. III. *Trial of Thomas Scott, Henrie Yair, &c. for treasonably rising in arms, and keeping her Majesty a prisoner, on the night that Riccio was murdered* - - 376
No IV. *Confession of the Laird of Ormiston, who was executed for the Murder of Darnley* - - 383
No. V. *Trial of the Earl of Mortoun for the Murder of Darnley* - - - - - - - 388
No. VI. *Expence of burning a Witch, A. D. 1649* - 392

OF OTHER CRIMES AGAINST RELIGION AND THE STATE.

	Page
Trial of John Ogilvie, Jesuit, for saying of Mass, acknowledging the Pope to be judge in controversies of Religion, and declining to answer certain questions put by his Majesty's Commissioners, concerning the Pope's power to excommunicate Kings, the murder of a King excommunicated and deposed by the Pope, and a Subject's being absolved from the allegiance due to such a King - -	328
Mr John Wallace for saying of Mass, being habit and repute a Popish Priest, and refusing to take the formula -	335
Sir James Ker for celebrating clandestine and irregular marriage - - - - - -	337
John Connochar for celebrating clandestine and irregular marriage - - - - - -	339
Mr Daniel Taylor, and twenty-four other preachers of the Episcopal communion in Edinburgh, Mr Arthur Miller preacher in Leith, and Mr Robert Colt, and Mr James Hunter, Musselburgh, for preaching to an Episcopal congregation without letters of orders from a Protestant Bishop, and without praying for King George by name -	343

WITCHCRAFT.

Alison Pearson - - - - -	347
Janet Grant and Janet Clerk - - -	348
John Cunninghame - - - -	ibid.
Agnes Sampson - - - - -	349
Euphan M'Calzeane - - - -	350

Patrick

	Page
Patrick Lawrie - - - -	351
Margaret Wallace - - -	ibid.
Isobel Young - - - -	353
Alexander Hamilton - - -	356
John Neil - - - -	357
Janet Brown, and others - - -	ibid.
Major Weir - - - - -	359
Isobel Elliot and nine other women - - -	360
Impostor of Bargarran - - - -	361
CONCLUSION - - - -	371

APPENDIX.

No. I. *Supersedere, or personal protection from arrest, granted to John Earl of Gowrie, June* 20. 1600 - -	373
No. II. *Excerpts from the 'Summondis of Treassoun' against Robert Logane, eldest sone to Robert Logane, sumtyme of Restalrig, and his tutors and curators, on account of the said deceast Robert Logan's accession to the E. of Gowrie's conspiracy* - - - - -	375
No. III. *Trial of Thomas Scott, Henrie Yair, &c. for treasonably rising in arms, and keeping her Majesty a prisoner, on the night that Riccio was murdered* - -	376
No IV. *Confession of the Laird of Ormiston, who was executed for the Murder of Darnley* - -	383
No. V. *Trial of the Earl of Mortoun for the Murder of Darnley* - - - - - -	388
No. VI. *Expence of burning a Witch, A. D.* 1649 -	392

ERRATA

E R R A T A.

Page 32. *line* 6. *for*, In the whole of the depositions there is not a word of the Earl's belt and magic characters, nor of his not bleeding till the belt was unloosed, and of the summons against the Earl of Gowrey's heirs, and the indictments against his followers who were executed at Perth; *read*,—In the whole of the depositions, and of the summons against the Earl of Gowrey's heirs, and of the indictments against his followers who were executed at Perth, there is not a word of the Earl's belt and magic characters, nor of his not bleeding till the belt was unloosed.

Page 370. *line* 9. *for*, 'tolerant', *read*, intolerant.

A

COLLECTION

OF

CRIMINAL TRIALS.

OF TREASON.

*Trial of John Master * of Forbess, for conspiring to assassinate King James V. for exciting a mutiny in the King's host, and for attempting to sacrifice part of the army to the English.*

JOHN Master of Forbess, on the 12th of June 1536, was accused by George Earl of Huntly, before the King and the Lords of the Privy Council, of the crime of Treason. The Treason charged was, that the accused had conspired † the King's death, by meditating to kill him with the shot of a cul- 1536

 verin,

* *Master* of Forbess is a Scottish phrase, signifying eldest son and heir-apparent of Lord Forbess, and so of the eldest son of any Baron. † Records of Justiciary, 12th June 1536.

1536 verin, when his Highneſs was in the borough of Aberdeen. The Maſter of Forbeſs proteſted his innocence, which he offered to maintain by ſingle combat. The Earl of Huntly declared, that his informers were not preſent; but he would bring a *landed man, or gentleman*, who would avow the charge before the King any day his Highneſs would appoint, and, failing thereof, he took up the pledge.

The Privy Council having taken the Earl of Huntly bound, under the penalty of 30,000 * merks, to make good his accuſation before the King, or the Court of Juſticiary at Edinburgh, againſt the firſt of the enſuing month of July; they, at the ſame time, ordered a herald to charge the Maſter of Forbeſs to enter himſelf priſoner in Edinburgh caſtle againſt eleven o'clock next forenoon, under the pain of treaſon; or, at leaſt, to find ſurety, to the amount of 20,000 merks, to ſtand trial on the day appointed; alſo, that, during his reſidence in Edinburgh, he ſhould not approach nearer the Royal palace than the Netherbow-port; and that, when it ſhould pleaſe his Majeſty to viſit the town, the Maſter of Forbeſs ſhould confine himſelf within his own apartments.

No further procedure was held in this matter till the 8th of December, when the King directed a warrant to the Privy Council, requiring them to give orders to the Juſtice Clerk to take ſurety from Lord Forbeſs, as well as the Maſter of Forbeſs, that each of them remain in Edinburgh caſtle till they find bail, to the † extent of 10,000 merks, to appear and ſtand trial when called on.

On

* For the value of Scottiſh money in thoſe times, ſee Arnot's Hiſt. of Edinburgh, p. 87. 90. &c.

† Rec. of Juſt. 11th December 1536. 14th July 1537.

On the 14th of July 1537, he was tried for High Treason before the Earl of Argyle, Justice-General, and the Commissioners of Justiciary. The indictment contained several charges, 'That 'the prisoner was guilty, *art and part* *, of a treasonable and 'abominable conspiracy to perpetrate murder † upon the King's 'most noble person, by the shot of a culverin, when his Highness was in his borough of Aberdeen, for the purpose of administering justice within the northern parts of his realm: 'That he was concerned, *art and part*, in the treasonable mutiny which arose in the last Royal army that marched to the 'borders, for national defence, against the English forces, the 'Scottish army being then at Jedburgh; and that he traiterously 'conspired the destruction of a part of the army raised to oppose 'the incursions and ravages of our ancient enemies of England, who were hovering upon the borders, to the imminent 'peril of the army, and to the great danger of the state: Also, 'that he traiterously aided our said enemies of England.' 1537

Fifteen persons, some of them men of distinguished rank, and all of them of respectable station, sat upon the jury. They were, Robert Lord Maxwell, William Master of Glencairn, Knight, Sir John Melville of Raith, John Hume of Coldenknows, George Crawfurd of Feddorat, Alexander Leslie of Pitcaple, John Pantoun of Pitmidden, David Duncanson of Standanstanes, John Leslie of Bouquhaine, Nicholas Ross of Auchlossin, James Garioch of Killstane, George Leslie of Newleslie, John Cumming of Cullen, Charles Dempster, and William Leslie of Coclarachie. The jury found him guilty of the whole

* *Art and part* is a phrase in the Scottish law, which denotes, aiding and abetting. It signifies the same with the Latin phrase *ope et consilio*. † The indictment is in Latin, the verdict in English.

1537 crimes charged againſt him, article by article. Sentence was then pronounced upon him, 'forfeiting his life, lands, and 'goods, moveable and immoveable; ordaining him to be *harl-* '*ed* * through the cauſeway of Edinburgh, and hanged on the 'gallows till he be dead, and to be quartered and diſmembered 'as a traitor.'

Drummond of Hawthornden, and the later Scottiſh writers, have thought proper, for what reaſon I know not, to pronounce † decidedly that this was an unjuſt ſentence. The following reaſons, however, lead me to think, that we are by no means entitled to conclude that the jury returned an iniquitous verdict, which was to infer ſo dreadful a doom; and that our idea of the priſoner's innocence cannot exceed bare conjecture. The evidence given on his trial is not recorded in the books of juſticiary, nor was it in uſe to be taken down at that period; and the preſumption ſurely is, that a jury would not, contrary to their conviction, ſacrifice the life, fortune, and fame of a fellow citizen.

About this period two inveterate factions ſprang up in Scotland. Lord Forbeſs was, perhaps, the very firſt man of rank in the north, '*magnae familiae et factionis princeps* ‡', who profeſſed the doctrines of reformation; hence we may ſuſpect the partiality of ſucceeding writers when treating of this Lord and his family. Such of the proceedings againſt the priſoner as we ſtill can

* Drawn on a hurdle.

† Drummond's Hiſt. of the James's, p. 104, Scott's Hiſt. of Scotland, p. 344.

‡ The caſe of Gowry affords a notable inſtance, that a champion of reformation was ſure to find in his party advocates ready, not only to wipe off the imputation of conſpiracy, but to retort the charge.

can diſtinctly trace, were neither harſh nor precipitate. The Earl of Huntly, the accuſer, was ordained by the Privy Council to find ſurety, to the amount of 30,000 merks, to make good his accuſation; whereas the priſoner, and Lord Forbeſs, by expreſs warrant, under his Majeſty's hand, were required to find ſurety only for 10,000 merks, to ſtand trial when called on. Upwards of thirteen months elapſed between the accuſation and trial, a period ſurely ſufficient for the abating of paſſion, and the inveſtigating of truth. The priſoner was a man of impetuous temper and profligate life; a perſon who, although many believed him innocent of conſpiring the King's death, although he denied it on the ſcaffold; yet the public hardly regretted his fate, on account of his profligacy and wickedneſs: And he himſelf acknowledged that he deſerved to die for the murder of the Laird of Meldrum. Even in thoſe barbarous times it was not uncommon for a priſoner to be acquitted by his peers of a charge of treaſon. Robert Lord Liſle was tried before the King himſelf, by ſixteen Lords and Barons * of Parliament, who pronounced him innocent of the treaſonable correſpondence with the Engliſh with which he was charged. And Archibald Douglaſs, when proſecuted for the treaſonable murder of Darnley †, in the verdict of his jury, experienced the like juſtice, *or favour*. Two eminent Scottiſh hiſtorians were contemporary with the Maſter of Forbeſs. At the time of his trial, Buchanan was thirty-one years of age; and Leſly, it is probable, was about the ſame period of life. They both mention the conſpiracy to aſſaſſinate the King; but ſuch is their inaccuracy, that neither of them takes notice of the charge of exciting a mutiny in the Scottiſh army, or that of a treaſonable correſpondence with the Engliſh. Leſly does ‡ not inſinuate that the Maſter of Forbeſs ſuffered an unjuſt

1537

* 28th March 1481. Arnot's Hiſt. p. 643.

† 26th May 1586.

‡ Leſly de Reb. Geſt. Scotor. p. 446.

1537 unjust sentence; but observes that his father, the Lord Forbess, after a tedious confinement in Edinburgh castle, on the same account, upon a more minute investigation, was exculpated from every suspicion of guilt. The indecisive ambiguous report of Buchanan, that many thought the Master of Forbess innocent of meditating an assassination, at the same time that his other crimes rendered him deserving of death, is the slippery foundation on which the carelessness or partiality of later authors has reared the fabric of his innocence, glittering in distant prospect, but vanishing upon approach.

I present the reader with the passage from Buchanan. I will not degrade his stile by attempting to translate it. 'Joannes 'Forbosius, juvenis acer, *et magnae familiae et factionis princeps*, 'ab Huntileio aemulo *creditur* oppressus. Erat enim quidam Strachanus, homo ad quodvis flagitium promptus, multos annos 'Forbosio valde familiaris, et omnium ei nequiter patratorum '*aut conscius, aut particeps, aut auctor*. Is parum (ut rebatur) ab 'eo pro merito cultus ad inimicum ejus Huntileium se confert; 'et crimen capitale, *vel ad eum detulit, vel (ut plurimi putant) una cum eo confinxit*: Quod Forbosius videlicet, ante annos complures, de rege occidendo consilium iniisset. Id crimen, quanquam 'nec satis firmis argumentis, nec idoneis testibus fuisset probatum, 'et studia inimicorum in judicio neminem laterent, 13 die Julii, 'a judicibus, magna ex parte ab Huntileio conductis, damnatus, 'capite luit. Sed ejus supplicium vulgo minus triste fuit, quod, 'etsi criminis, ob quod poenas dederat, expertem homines *crederent*, tamen, ob superioris vitae facinora, morte non indignum '*existimarent* *.'

* Buchanani Hist. Lib. 14. § 53.

Mr

Mr Archibald Douglass, Parson of Glasgow, for the Treasonable Murder of Henry King of Scots. 1580

ARchibald Douglass was cousin to James Earl of Morton, Regent of Scotland. By him he was appointed a Lord of Session on the 11th of November 1578; and, in the interval * between the downfall and execution of the Regent, he was dismissed from the bench.

On the 31st December 1580, the Earl of Morton, and the prisoner, were both accused before the Privy Council of the murder of Darnley. The King sent privately to apprehend the prisoner, who was then at Norham; but he, having got intelligence of Morton's commitment †, fled to England; and Elisabeth, in the usual stile of her policy, refused to listen to James's repeated entreaties that she would surrender the prisoner to justice.

After being degraded from the bench, the parliament pronounced, in absence, a decree ‡ of *forfaulture* § against him in the month of November 1581. The same parliament passed an act of approbation of the Earl of Arran's ‖ proceedings concerning the murder of the King's father. This act sets forth, that the Earl of Arran had accused ¶ the late Earl of Morton, and Archibald Douglass, as guilty, *art and part*, of the murder of Darnley; that Douglass, conscious of his guilt, had fled to England, and continued fugitive. And a solemn protestation was entered in parliament,

* April 26. 1581. † Spottiswood's History, p. 310. 348. ‡ This decree is not entered in the rolls of parliament. § Forfeiture. ‖ Capt. James Stewart. ¶ Unprinted Acts, October 24. 1581. General Register.

1586 parliament * by many Lords, dignified clergymen, and barons, that nothing ſhould hereafter be done contrary to the ſtatutes enacted in A. D. 1571, and 1579, concerning the murderers of the King's father, till his Highneſs ſhould be of age.

At what time the priſoner returned to Scotland I know not; but, if my notion of his trial be well founded, he returned in the well grounded confidence that all his powerful friends did not die with Morton.

While the King was yet a minor, the miniſters and officers of ſtate had the aſſurance to paſs an act under the Great Seal †, reſtoring the priſoner, in his Majeſty's name and authority, againſt the decree of parliament *forfaulting* him for the murder of the King's father. This act of *rehabilitation*, as it is called, contains, at the ſame time, an awkward and incongruous clauſe, declaring, that, if the priſoner ſhould be found guilty of the murder, the act ſhould be of no force or effect. On the 21ſt of May 1586, within three weeks after the date of the former act ‡, the priſoner received a pardon under the Great Seal for all crimes and treaſons committed by him, except the murder of the King's father, and five days after he was tried for that murder.

A commiſſion was paſſed under the Quarter Seal, appointing Mr John Preſtoun §, and Edward Bruce, Advocates, Commiſſaries of Edinburgh, to ſit in judgment upon the priſoner, who was

* The act 1579. c. 36. prohibited and annulled all diſpoſitions and alienations of goods or eſtates, made, or to be made, by any perſons convicted, or to be convicted, of the murder of Darnley, or of the Regent Murray. † Great Seal Records, May 1. 1586. ‡ Ibid. May 21. 1586. § Records of Juſticiary, May 26. 1586.

was brought to trial on the 26th of May 1586. It was charged 1586
in the indictment, that the prisoner *, in the months of January and February 1566, along with James late Earl of Bothwell, James Ormeston of *that Ilk*, Robert Ormeston his uncle, James Hay † of Talla, John Hepburn, called John of Bowtown, and sundry other accomplices, did conspire, and finally did determine upon, the murder and parricide of the late Henry King of Scots: That the prisoner, and the other persons mentioned, by themselves, their servants, and their accomplices, were guilty of perpetrating, aiding, and abetting, the treasonable murder of Henry, and of William Tailzeor, and Andrew Mackaig, his grooms ‡ of the chamber, in a lodging beside the *Kirk of Field*, in the burgh of Edinburgh, upon the 10th of February 1566, about two hours past midnight: That they burned the house, and blew it up in the air, by the force of gun-powder, which, for that purpose, they had recently conveyed into vaults, and other low and dark places under ground: That, thereby, the prisoner had

* In the indictment, he is designed Mr Archibald Douglass parson of Glasgow; but, in the *rehabilitation* and pardon under the great seal, he is further designed one of the ordinary Lords of Session, notwithstanding he appears to have been dismissed from the bench in April 1581.

† It was this James Hay of Talla and John Hepburn who actually set fire to the match. The Earl of Bothwell, and others of his accomplices, waited in the court-yard. As it was a quarter of an hour ere the house blew up, the Earl grew impatient, dreading that the match was not rightly kindled, and would have gone into the house to see if the match was burning, had he not been prevented by Hepburn. The conspirators saw the house *rise in the air*, heard the crack, and ran off; Bothwell hied himself down to his lodgings in the palace of Holyroodhouse, and went to bed for half an hour, till the event, which he so well knew, was announced, the news having reached the palace. (See the depositions of four of the conspirators who suffered for this crime, Anderson's Collections, Vol. ii. p. 165.) No mention is made in these depositions of the prisoner Douglass having been present.

‡ The phrase in the libel is *cubicularis*.

1586 incurred the pains of treaſon, and ought to be puniſhed by the loſs of life, fortune, and fame: That, further, he was in the treaſonable foreknowledge of the crime, and concealed it, by which he had incurred the like penalty: That, as another circumſtance of his being guilty, *art and part*, of perpetrating the ſaid murder, he, in the hurry and buſtle which accompanied that deed of darkneſs, *tint his mwlis* *, which next day being found upon the ſpot, were acknowledged to be his: That his guilt was farther confirmed by his flight into England, to which he had recourſe when ſummoned before the Privy Council to anſwer for this crime: That he remained in England ſeveral years, which was a tacit acknowledgement of his guilt; and that, in November 1581, he underwent a ſentence of forfeiture for the ſaid crime: That his intimate friend, John Binning, who was convicted and executed for the murder in June 1581, did frequently depoſe and declare, that the priſoner was guilty, *art and part*, of the crime, and did actually deviſe and perpetrate the ſame; and that Binning repeated this declaration in preſence of the whole people at the place of his execution: And, *laſtly*, that James Earl of Morton before his death confeſſed his foreknowledge of the murder, and declared it was the priſoner who revealed the ſame to him, and that he, the priſoner, was actually preſent at the committing of the murder.

The indictment being read, the priſoner produced a warrant from his Majeſty, directed to the juſtices, requiring them to admit his lawful defences. He declared, that, truſting to his innocence, he deſired no prolocutor; and he pleaded, that the charge of foreknowledge of the murder, and concealing the ſame, ought not to paſs to the knowledge of an aſſize, in reſpect of his

* *i. e.* Loſt his Slippers.

his Majesty's pardon; and the Court sustained this plea. The court then proceeded to name a jury, when an unusual obstacle to the trial occurred. Of the persons summoned to be upon the jury, a sufficient number did not give obedience to the citation. The absent jurymen were fined, and the trial stopped; but, from whatever cause the absent persons declined to sit on this jury, the prisoner had no mind that the trial should be interrupted. Nor was the court hostile to his wishes. It continued to sit in a pause till a precept directed to the justices and advocate-substitute was procured from his Majesty, *and produced by the prisoner*. This precept set forth, that the prisoner *was presently entered in pannel*, to stand trial for the murder of Henry; that the trial stopped through the not appearing of a sufficient number of jurors; and it required the judges and King's counsel to supply the number of the absents by such gentlemen as happened to be at the bar, or in the court. The advocate substitute desired that this precept might be entered in the process as his warrant, and trial proceeded. 1586

The nine jurymen who appeared, in consequence of their summons, were Patrick *Master of Gray*, chancellor (*i. e.* foreman) of the jury, James Colvill of Easter Weemyss, *Robert Logan of Restalrig*, Andrew Gray of Dunynald, Andrew Logan younger of Cotfield, Gilbert Gray of Baldinran, Mr Samuel Cockburn of Templehall, George Home of Spott, Patrick Johnston younger of Elphinston. Those who were picked from the bar, and added to the list, were William Ker younger of Ancrum, Alexander Baillie of Littlegill, Master Robert Fawside younger of that Ilk, Gavin Carmichael of Wrichtslands, James

 Logan

* Produced at the bar.

1586 Logan of Parsonsknows *, Andrew Ker of Greenhead, George Hamilton of Preston, and Walter Ker, brother to the Laird of Greenhead.

Seventeen jurymen sat on this trial; this was uncommon, but not unprecedented †. Nineteen were summoned to be upon it, of whom *nine* only obeyed the citation. The ten who absented themselves were, Sir Archibald Napier of Edenbellie, Knight, Sir John Edmestoun of that Ilk, George Home of Wedderburn, Alexander Dalmahoy of that Ilk, ——— Mowbray of Barnbougle, Francis Douglass of Borg, Thomas Otterbourne of Redhall, George Home of Broxmouth, Robert Lord Seytoun, and Patrick Cargill of that Ilk. They were fined L. 14 each for their disobedience.

It might naturally be expected, with regard to persons even in the respectable sphere of life to which these jurymen belonged, that the lapse of two hundred years should have consigned their actions, their characters, and their attachments, to oblivion. This, however, is far from being the case; and, from the circumstances concerning the jurymen which I am still able to trace, I am confirmed in the notion, that this was a collusive trial, devised with no other purpose than to screen the prisoner from the consequences of guilt; a notion strongly suggested by the royal pardon and act of *rehabilitation*, the shyness of jurymen to sit upon the trial, the prisoner's *producing*, and in all probability *procuring* a royal precept to force on the trial, by supplying the absent jurymen with those persons who happened to be at the bar, or

* Parsonsknows was a part of the estate of Restalrig. It is the spot on which the house of Mr Alexander Robertson, one of the principal clerks of session, is now built. † Craig de Feudis, p. 49.

or in the court, the former of whom, it must be presumed, were 1586
his friends; and finally, by the jury's returning a verdict, which seems contrary to fact, perhaps also to law and evidence. However infamous, however astonishing it may appear to us, yet one of the original jurymen who were summoned on this trial, George Home of Spott*, on the 16th of June 1582, was himself tried and acquitted for this individual murder. And in his indictment, it was directly charged, that he was guilty of the murder; or, at least, that he had previous knowledge of it, and concealed the same, *and perfectly knew that the prisoner, and John Binning, the prisoner's servant, were perpetrators of the murder.* Another of the jurymen was Robert Logan of Restalrig, who was convicted and forfeited for his concern in Gowry's† conspiracy. A third person, the Master of Gray, chancellor ‡ of the jury, in the course of that very year, was sent by King James ambassador to England to intercede for Queen Mary's life. On this embassy, so *faithfully* conducted, so *fortunately* terminated, Douglass the prisoner had been formerly sent: But his fidelity being suspected, the Master of Gray, and Sir James Melville, were appointed to supersede him; and the languor or duplicity of the prisoner's conduct yielded in point of treachery to the conduct of Gray his successor. Instead of interceding for the captive Queen, the Master of Gray urged Elizabeth to execute the sentence, reminding her of the mean adage, *Mortui non mordent.* He was sentenced for his treachery to perpetual banishment;

* MS. Abstract of the Records of Justiciary in the Advocate's Library, Vol. i. p. 113.

† Spottiswood's History, p. 457. 509.; Robertson's History, Vol. ii. p. 258.

‡ Robertson's History, Vol. ii. p. 167. 182. 246. Append. No. 13. 14.; Spottiswood, p. 351. 352. 353. Spottiswood is here inaccurate. He addresses a letter of the King to the Master of Gray, which was truly addressed to the prisoner, and dated long before Gray set out on his embassy.

1586 nishment; and finally, he acted as Queen Elizabeth's spy in Italy *.

The counsel for the prosecution, in order to prove the indictment, produced the process of forfeiture for this crime, led in Parliament against the prisoner, and sentence following upon it, in November 1581.

The prisoner, in his defence, denied *simpliciter* the first article of the libel **, *viz.* the actual murder, and being concerned in it, *art and part*. As to the losing his *mwles*, he averred it to be false, and required the same to be proved by any person who was

* To throw every light on this mysterious trial, as well as the subsequent trials of the Earl of Gowry, and Logan of Restalrig, it may not be amiss to state the following genealogical anecdotes, as they will further illustrate the affinity between the families of Gowry, of Gray, of Logan of Restalrig, of Colville of Easter Weemyss, and Johnston of Elphinston. Several persons of the name of Gray and Logan were upon the jury; and three of the name of Ker. The Kers and the Logans were nearly allied: This William Ker younger of Ancrum, had an aunt, Janet Ker, who got certain lands * from her father, A. D. 1519. And in the family vault of Logan of Restalrig, there still remains a stone bearing this inscription †, '*Lady Jonet Ker, Lady Restalrig, quha departed this life 17th May* 1526.' They were again allied in the person of Robert Logan himself, whose Lady's name was Marion Ker ‡. William, second Lord Ruthven, who died A. D. 1553 §, had a daughter Barbara, married to Patrick, sixth Lord Gray, father *to the Master of Gray*, who sat on this jury. He had another daughter Margaret, married to James Johnston of Elphinston. William's son, Patrick, third Lord Ruthven, who was concerned in the murder of Riccio, had a daughter, Isobel, married to Sir James Colville of Easter Weemyss. Patrick, 6th Lord Gray, and father to the celebrated Master of Gray, married Barbara Ruthven, sister to Patrick 3d Lord Ruthven, and aunt to William first Earl of Gowry. Agnes Gray, sister to the 6th Lord Gray, and aunt to *the Master*, was married to Sir Robert Logan of Restalrig, father to Robert Logan, who was forfeited for Gowry's conspiracy.

** *Libel* is the Scottish law-term for *indictment*.

* Douglass's Peerage, p. 418. 419. † Arnot's History of Edinburgh, p. 257. ‡ Record of Signatures, 15th July 1607, 6th April 1620. § Douglass's Peerage, p. 305. 314.

was present at the finding of them, or who had seen them at any time from that period to the present hour: That the circumstance of losing his mwles could not be instructed by Binning's deposition, declaring that the prisoner went forth, armed in his *secret* and * *steel bonnet*, to the committing of that horrible crime; for the road between the prisoner's lodging and the place where the murder was committed, was by no means fit for an armed man "*to pass with* † *welivat mwles to sick a deed*:" That, in all probability, no such thing was found there, and that it was but a mere fiction. As to the inference of guilt, drawn from his flight into England, upon getting intelligence that he was accused before the King and Privy Council of this treasonable crime, on the last day of December 1580, and his shortly afterwards being forfeited for the same, he declared that he absented himself from the realm out of a just fear, which would have moved any man; for his whole goods and possessions '*had been intromitted with, before any attaching*;' but that, speedily after his leaving the realm, and as soon as he got information that he was charged with this horrible crime, of which he was innocent, he instructed the Queen of England's ambassador in Scotland, for the time, to offer, in the prisoner's name, to present him to the King, that he might stand trial, '*upon condition that there should be deputed unsuspected judges and persons of assize*;' whereunto his Highness answered, '*That he would not indent with his subject*.' As for the process of forfaulture produced, it could nowise tend to his conviction, in respect of the letters of *rehabilitation*. 1586

To this the King's Advocate answered, and the answer was solid, That the letters of rehabilitation could not restore the prisoner

* *Secret* is an old Scottish word for an under coat of defence, probably made of wire.

† In velvet slippers to such a deed.

1586 soner against the sentence of forfeiture, which being pronounced by Parliament, and remaining unreduced, could not be done away by any other authority than that which established it; and this he desired might be attended to by the jury. For verifying the indictment, he further produced three declarations and depositions, emitted before the Privy Council by John Binning, late servant to the prisoner, on the 10th, 11th, and 15th May 1581. In these depositions, which were authenticated by the subscriptions of the great officers of state, the deponent firmly and constantly swore, that the prisoner '*passed to the deed doing, the said John Binning and Thomas Gairner, his servants, being with him in company.*' The pursuer produced three other depositions, one by the late James Ormestoun of that Ilk, another by the late John Hay of Talla, and a third by the late Paris a Frenchman.

The prisoner argued, that John Binning's depositions could not militate against him, because they were self-contradictory, the deponent sometimes declaring that the prisoner had gone to his bed on the night of the murder, and that the deponent left his master's chamber and went to his own dwelling-house, where he was taking his repose while that horrible murder was perpetrating; and that, 'hearing *the crack of the blowing of the King's house in the air with powder*, he rose and came to his " master's chamber, where he found him—*lying on his bed, reading on a book.*' But declaring, in another part of his deposition, that, on the night of the murder, the prisoner, after supping in his own apartment, nobody being with him but the deponent and Thomas Gairner, both his servants, went out at the back door of his house to the committing of the murder, accompanied by these his servants: That there was another inconsistency in the deposition; for Binning declared, that, on the next

next day, he attended his master to the tolbooth, *i. e.* to the Court of Session, which was impossible; for the night of the murder was that of Sunday preceding Fastern's Even, which was vacation time, when the Lords did not sit: Further, that the prisoner was not then raised to the bench; and that Binning was not his servant at the time of the murder, nor did he come to his service for two years after; and he pressed it upon the assize to mark these inconsistencies and contradictions. 1586

The King's Advocate answered, that the deposition of Binning was sufficient to testify the libel to be true; for that, in all the material parts of his evidence, he declared the prisoner to be participant in the murder. The prisoner replied, that Binning was but a *single witness*, which was not sufficient to convict, in a civil action, far less to infer condemnation for a capital crime. He pleaded further, that the confession of the Earl of Morton ought not to be regarded, for the same had not been produced in parliament, when the sentence of forfaulture was pronounced against the prisoner; neither was it now laid before the jury; and *, besides, the confession was emitted after the Earl's condemnation, consequently it was that of a person *dead in law*. Finally, he alledged that the depositions of Ormeston, Hay, and French Paris, far from criminating him, testified his innocence; for that these deponents described the whole circumstances of the *murder committed by themselves and their accomplices*, without making any mention of him. The argument was finished by a reply from the King's Advocate, in which he maintained, that

 the

* This confession was supposed at the time not to have been produced on purpose to afford the jury a pretext for acquitting the prisoner. And the contrivance and success of this collusive trial were imputed to the intrigues of the Master of Gray, and of Randolph the English ambassador. Moyes's Memoirs, p. 108. for A. D. 1586.

1586 the deposition of Binning, to which he adhered at the hour of death, together with the notoriety of the fact, and the confession of the Earl of Morton, which was '*more than notorious*' to the assize, and to the whole country, and consequently needed no production, were more than sufficient to convict the prisoner: And he protested for an *assize of willful error*, if the jury should *cleanse and acquit him*.

Sir William Stewart, son to Lord Ochiltree, also appeared at the bar, and, as near cousin and kinsman to the King, set forth, that in respect of the prisoner's being convicted in parliament, of *art and part* in the treasonable murder of Henry, if the jury should acquit him, he protested for an assize of willful error. And the prisoner protested in the contrary, in respect of his answers, defences, and letters of rehabilitation.

The jury withdrew, chose the Master of Gray their chancellor, and all in one voice found the prisoner *clean and acquit of being in company with Bothwell, Ormeston, Hay, Hepburn, and their accomplices, in committing the crime as libelled.* The jury then inserted their reasons for acquitting the prisoner, and these were merely a recapitulation of the arguments urged by him in the course of the trial. Only they mention a third person to have been killed in the King's lodging, one William Glen, who was one of his Highness's grooms of the chamber, as well as William Tailziour, and Andrew Makcaig, mentioned in the libel *.

To

* In the brief account of the trials of Binning and Home of Spott, that is given in the abstract MSS. of Justiciary Records, there is not a word, either of proof or argument. That I might throw every possible light on the trial of Douglass, I endeavoured

To this account, taken from the public record, I beg leave to subjoin Archbishop Spottiswood's opinion of the trial. 'In the 'estate,' says he, 'matters went not much better at this time, and 'amongst others, nothing give more offence than the acquit-'ting of Mr Archibald Douglas, by form of assize. This man 'was known to be guilty of the murther of the King his father, 'and had fled into England six yeares before. The Earl of Mor-'ton, at his death, and one Binny, Mr Archibald's own servant, 'who was executed about the same time, did both declare, that 'he was present at the doing of that wicked fact, for which the 'King had often, by his letters and ambassages, intreated the 'Queen of England to have him delivered, yet could not obtain it. 'At this time a remission being purchased to him for the con-'cealing of that murther, with a letter of rehabilitation, where-'by he might stand in judgement and plead against his forfei-'ture, he was in a jury held the 26th of May declared inno-'cent, and absolved of the crime. 1600

'This was done by the procurement of the Prior of Blantire, 'who had obtruded himself in the Parsonage of Glasgow, where-

 'of

deavoured to have recourse to the original record; but the volume of Records, or *Book of Adjournal*, (as it is termed), containing the proceedings from 20th Decembee 1580, to 27th November 1584, is not to be found. This vexed me the more, as Binning having been tried on the 3d of June 1581, and the Earl of Morton having been tried before that same court, on the very day preceding, I flattered myself with the hope of giving that trial to the public; but, from a note in the abstract MSS. taken from the volume now missing, I find that Morton's trial was not entered on the Record. MSS. Abstracts, p. 111. 113. 118. I also searched the Records of Privy Council and Justiciary, with a desire of examining their proceedings in A. D. 1567, being the year in which Ormeston, Hay, Hepburn, &c. were condemned and executed for the murder of Darnley: And I can hardly persuade myself that it is owing to accident that the records of both these courts for this year are also missing.

1586 'of Mr Archibald had been titular, and otherwise than by his restoring could have no right in law to retain it. Many were 'grieved to see justice in that sort abused, for maintaining a sacrilegious possession; but to have sent him (Mr A. Douglas) 'back to England, with a commission to reside there as ambassador for the King, which likewise was done, was an errour inexcusable; and how he, and the Master of Gray, who was 'chiefe man in that led assise, carried themselves in the Queen 'of Scotland's businesse, wherewith they were trusted, we will 'hear in the end of this year *.'

John Earl of Gowry, and Mr Alexander Ruthven, for conspiring to bereave his Majesty of life at St Johnston, 5th August 1600.

THE Majesty of Rome had subsisted for many ages, and her sway extended over the fairest part of the globe, ere the punishment of treason was inflicted after the death of the traitor. And it was not till the division of the empire between Arcadius and Honorius, a period when the weakness of government increased its jealousies and its severities, that a sentence of infamy could be pronounced after death for that crime, and an action brought for wresting the estate from the heirs of the traitor. With a similar policy, James V. who had long been harrassed by his nobles, solemnly adopted this punishment as a part of our law, when he beheld the storms that were gathering round the throne from the enthusiastic spirit of religious and civil liberty that sprang up at the reformation †.

Sir

* Spottiswood's Hist. p. 347.

† Digestorum, lib. 48. tit. 4. lex. 9.; Codicis lib. 9. tit. 8. lex. 5. et seq. A. D. 397.; James V. parl. 6. chap. 69. A. D. 1540.

Sir Thomas Hamilton, King's Advocate, produced before the parliament, on the 4th of November 1600, a summons of treason, duly executed, against William Ruthven, brother, and apparent heir, to the Earl of Gowry, and to Mr Alexander Ruthven; and against his tutors and curators, and all having interest, to hear it found and declared that the said Earl, and Mr Alexander, had committed treason, by attempting to bereave his Majesty of life on the 5th of August 1600. The summons, which contains a minute narrative of the transactions of that busy day, is dated on the 26th of August, precisely three weeks after the date of the conspiracy, and the day of appearance was the 4th of November, an interval sufficient for peoples minds to cool after so great an event, for the defenders preparing their defences, and for investigating the truth. 1600

The execution of the summons was certified when it was first laid before parliament. It was produced a second time on the 11th of November. On the 15th, the parliament resumed the cause; and the Lord Advocate produced the following depositions that were taken before the *Lords of Articles* *.

Andrew Henderson, chamberlain to the late Earl of Gowry, deposed, that, on the night of Monday the 4th of August, he, after supper, was in the Earl of Gowry's own chamber with his Lordship and Mr Alexander Ruthven. The Earl asked him, What he had to do to-morrow? to which he answered, to ride to Ruthven, to speak with the tenants. His Lordship desired him to

* The *Lords of Articles* were a committee of the different estates of Parliament, who prepared the business that was to come before the house. They were this year chosen on the 11th of November; the depositions were produced in Parliament on the 15th; they must therefore have been emitted between the 11th and the 15th.

1600 to poſtpone that journey, and to be ready by four in the morning to attend Mr Alexander to Falkland; to take Andrew Ruthven with him; to make haſte back with what *anſwer* his Lordſhip's brother ſhould order, and to leave Andrew with Mr Alexander. They ſet off at the hour appointed, and arriving betimes at Falkland, *the Maſter* ſent the deponent at ſeven o'clock to ſee what the King was doing. He found his Majeſty in the court-yard booted, upon which he returned to the Maſter, ſaying, 'Haſte you, the King is coming forth.' The Maſter immediately followed his Majeſty, ſpoke with him for about a quarter of an hour, and, during the converſation, the King frequently clapped him on the ſhoulder. The Maſter then bid the deponent ride in all haſte to Perth, as he loved Lord Gowry and his honour, and acquaint him that the King would be there with a *ſlight retinue* ſpeedily, and tell the Earl to cauſe dinner be prepared for his Majeſty. The deponent got back to Perth about ten o'clock, when his Lordſhip inquired anxiouſly what anſwer he had brought; what reception his brother had from the King; and what number of perſons was hunting with his Majeſty? The deponent * ſaid, the anſwer was, to prepare dinner for the King: That the reception his brother had was courteous; and that there were ſundry of his Majeſty's houſehold, and ſome Engliſhmen, hunting with the King. The Earl aſked what noblemen were with the King? to which he anſwered, 'none but my Lord Duke †.' He then went to his own houſe and put off his boots, and, upon his return, the Earl ordered him to put on his, the deponent's, coat of mail, and plate ſleeves. He aſked for what purpoſe? The Earl anſwered, he had a Highlandman to take in the Shoegate ‡. About half paſt twelve his Lordſhip bid him bring

* Regiſter of Parliament, November 1600; Cromerty's Account of Gowry's Conſpiracy, p. 38. *et ſeq.*

† The Duke of Lennox.

‡ Shoe Lane.

bring up dinner. The Earl sat down to dinner with three gentlemen, and, while the first course was on the table, Andrew Ruthven returned from Falkland, and whispered to his Lordship. Soon after, Alexander Ruthven and William Blair came to the Earl, while sitting at dinner, upon which the company instantly rose from table, and my Lord bid the deponent send for his steel bonnet and gauntlet. My Lord then went to *the Inch* *, and soon returned with the King, the Duke of Lennox, and the Earl of Marr. After his Majesty came to the house, *the Master* of Ruthven asked the deponent for the key of the gallery chamber, who answered, he had not handled it since the Earl came to Scotland. He then went, at *the Master's* desire, and got the key for him from Mr William Rynd. Immediately upon his Majesty's sitting down to dinner, the Earl spoke privately to the deponent in the room where the King dined, bidding him go to the gallery to his brother. He went; the Earl followed; and they being all three in the chamber, my Lord said to the deponent, *tarry with my brother, and do what he bids you.* The deponent then asked the Master's commands, which were, to 'go 'into the round of the chamber,' into which the Master locked the deponent, and took the key along with him. Here he remained locked up, accoutered in his coat of mail, plate sleeves, sword and hanger, but wanting his steel bonnet. All the while he dreaded that some mischief was to be done; and he kneeled, and prayed to God. In about half an hour Mr Alexander returned, entered the chamber first, having the King by the arm, put on his hat, drew the deponent's hanger, and addressing the King, said, '*Sir, you must be my prisoner; remember on my Fa*'*ther's death*.' And, as he held the hanger at his Majesty's breast, the deponent wrenched it out of his hand. The King said, 'Mr 'Alexander

1600

* A level field used as a mall, adjoining to Perth, on the road to Falkland.

1600 'Alexander, ye and I were very great together; and, as touching your father's death, Man, I was but a minor.' The King added, 'although ye bereave me of my life, *ye will not be King of Scotland, for I have both ſons and daughters*.' Mr Alexander anſwered with a great oath, it was not his life that he deſired, but a promiſe to his brother the Earl. The King ſaid, fetch hither your brother; and Mr Alexander ſtipulated, that the King ſhould not cry, nor open the window till his return, and then went away, and locked the door after him. Upon this the King aſked the deponent, 'How came ye in here, man? and this deponent anſwered, As God lives I am ſhut in here like a dog.' The King ſaid, 'Will my Lord of Gowry do me any evil, man? This deponent anſwered, I vow to God I ſhall die firſt.' He then, at the King's deſire, went to open the window; but, before he got it opened, Mr Alexander returned, and ſaid to his Majeſty, 'By God there is no remedy;' then leaped upon the King, and gripped both his hands, he, Mr Alexander, having a garter in his. Then the King ſaid, 'I am a free Prince, man, I will not be bound.' So his Majeſty caſt looſe his left hand from Mr Alexander, and, at the ſame time, the deponent drew away the garter, and the King leaped out of his grip. He then threw his left arm round the King's neck, and crammed his right fiſt into his mouth; and his Majeſty and he wreſtling, the deponent pulled his hand out of the King's mouth. The deponent then reached over the King's ſhoulder, and pulled up the board of the window, and his Majeſty cried, 'Treaſon! treaſon!' Mr Alexander ſpoke thus to the deponent, '*Is there no help with thee? Woe worth thee, thou villain, we all die!*' Then he clapped his hand to his ſword; but the King putting his hands on the Maſter's, ſtopped him from drawing it. Thus ſtruggling, they ſtaggered forth of the cabinet into the chamber; the door of which the deponent unlocked,

1600

locked, that he might make his own eſcape, and let in the King's ſervants. Juſt as he opened it, John Ramſay entered, *with a hawk on his hand, drew his hanger, and laid about him.* The deponent then went down ſtairs, and, as he came to the front gate, the Earl of Gowry was ſtanding before the gate, accompanied by ſundry perſons, having the deponent's helmet on his head, and a drawn ſword in * each hand. The deponent then went to his own houſe, where he remained till the King left the town. After this, he went to the bridge, and walked up and down about an hour. When he returned home, his wife aſked at him, ' What trouble was within *the place?* To whom ' he anſwered, *well is me* of one thing, that, if I had not been ' there, the King had been twice † ſticked this night: But woe's ' me for the thing that is fallen out.' The deponent added, that, being met by Mr John Moncrieffe on his return from Falkland, who aſked, Where he had been, ſeeing his boots were on? He anſwered, ſome miles beyond Erne, not daring to unfold the particulars, as the Earl had forbid him to tell the errand ‡.

The Duke of Lennox depoſed, that, on the 5th of Auguſt laſt, being in company with the King at Falkland, he ſaw Mr Alexander Ruthven ſpeaking with his Majeſty before the ſtables, between ſix and ſeven in the morning. Soon after the King went a ſtag-hunting; and having killed a buck in the Park of Falkland, he deſired the deponent to accompany him to Perth, where he meaned to have ſome converſation with the Earl of Gowry. The deponent immediately ſent his ſervant for another horſe, and for a ſword, and followed the King. When he overtook his Majeſty, Mr Alexander was ſpeaking with him. Shortly after the Duke's coming up, the King rode aſide, and ſaid to the deponent,

* It was common, at this period, for combatants to fight with weapons in each hand; Lord Gowry had been long in Italy, and probably was a good ſword's-man. Arnot's Hiſt. of Edinburgh, p. 70. † Stabbed. ‡ All the depoſitions are ſubſcribed by the reſpective witneſſes.

1600 deponent, 'Ye cannot guefs, Man, what errand I am riding for; 'I am going to get *a pofe** in Perth: And Mr Alexander Ruthven has informed me that he has found a man that has a pitcher full of coined gold of great forts.' The King at the fame time afked the deponent what fort of a man he took Mr Alexander to be; who anfwered, 'That he knew nothing of him, but 'as of an honeft difcreet gentleman.' The King afterwards defcribed to him minutely the circumftances of *the pofe*; to which the deponent anfwered, 'I like not that, Sir, for that is not 'likely.' As they rode by the bridge of Erne, his Majefty faid, 'That Mr Alexander defired him to keep that matter of the *pofe* 'fecret, and take nobody with him.' But the King, both at that time, and in the Earl of Gowry's Hall at St Johnfton, bid the Duke *take taint* (i. e. take heed) where I pafs with Mr Alexander 'Ruthven, and follow me.' When the King was within a mile of Perth, Mr Alexander rode on before the company, on purpofe, as the deponent believes, to advertife the Earl of his approach; and, when they were within two *pair of butt-lengths* of the town, the Earl, accompanied by diverfe perfons on foot, came out to meet the King. Then his Majefty, accompanied by the deponent, the Earl of Marr, Abbot of Inchaffrey, Sir Thomas Erfkine †, the laird of Urquhill, James Erfkine, William Stuart, Sir Hugh Harries, Sir John Ramfay, John Murray, John Hamilton of Grange, and John Graham of Balgowan, paffed all together

* A hidden treafure. This was by no means fo improbable a tale, as one, from merely viewing modern manners, would deem it. The King was given to underftand that this ftrange man was an emiffary of the court of Spain, furnifhed with a quantity of gold for the purpofe of exciting frefh commotions. When the Earls of Huntly, Bothwell, and Crawfurd, were tried for various points of treafon, A. D. 1589 they (and in particular the Earl of Bothwell,) were convicted of receiving from certain Jefuits, and from Graham of Fintry, large quantities of Spanifh gold, for the purpofe of raifing forces. Rec. of Juft. May 24. 1589.

† Created Earl of Kellie.

together to the Earl of Gowry's hall, in company with his Lordſhip and Mr Alexander Ruthven. The King called for a drink, which was long of being brought to him; and it was an hour ere his dinner was ſerved up. When the deſert was on the table, Lord Gowry came to the deponent, and the other perſons of his Majeſty's ſuite, and deſired them to dine; which they did accordingly in the hall. When they had nigh dined, the Earl came to them from the King's chamber, and called for wine, ſaying, he was directed from his Majeſty's chamber to drink the King's health, to my Lord Duke, and the reſt of the company. Immediately after the health was drank, the deponent roſe from table to wait on the King, conform to directions; but the Earl ſaid to him, his Majeſty *was gone up quietly ſome private errand.* His Lordſhip then called for the key of the garden, into which he walked, in company with the deponent, and ſome others. Soon after, Mr Thomas Cranſton came to them, crying, 'The King's Majeſty is 'on horſeback, and riding through the Inch.' Then the Earl cried, 'Horſe! Horſe!' Cranſton anſwered, 'Your horſe is in 'town.' His Lordſhip made no reply, ſave continually crying, 'Horſe! Horſe!' The deponent and the Earl came firſt out of the garden, through the hall, to the cloſe; and, as they came to the outer gate, the deponent aſked at the porter if the King was gone forth, who anſwered, that aſſuredly he was not. The Earl ſaid, 'I am ſure he is firſt always. Stay, my Lord, drink, and 'I ſhall go up, and get the verity thereof.' Immediately he came down again, and affirmed that the King was gone out at the back gate, and away. Upon this the deponent, the Earls of Gowry and Marr, with the reſt of the company, went out at the front gate; and, as they were ſtanding there in the ſtreet, deliberating where to ſeek the King, the deponent heard a voice, and ſaid to the Earl of Marr, '*This is the King's voice that cries, be where* '*he will.* So they all looked up to the lodging, and ſaw his Majeſty 1600

1600 'looking forth of the window, *wanting his hat, his face red,* '*and an hand griping his cheek and mouth, and the King cried, I* '*am murdered! Treason! My Lord Marr, help, help!*' Instantly the deponent, Lord Marr, and the company, ran up stairs to the gallery chamber, where his Majesty was, to have relieved him; but the door was fast. Seeing a ladder, they rushed it against the door; but the ladder broke. They then sent for hammers; and, notwithstanding they thundered at the door with large forcing hammers, they got no entrance, till the Earl of Gowry and his brother were both slain. When they got admission, by assistance of those within the chamber, who helped them to break open the door, they found Lord Gowry lying dead, his brother Mr Alexander being slain, and carried down stairs before their entry. When they entered the room where the King was, the deponent saw, through one of the doors, which was by no means close, the pushing of halberts and swords; but knew none of the combatants save Alexander Ruthven of Freeland; and how soon the said Alexander heard my Lord Duke's voice, he and his accomplices left that door, and gave no further disturbance. Depones, That he saw several of Lord Gowry's servants in arms in the close, both before and after the King dined, and that there was a tumult before the Earl's lodging, and in the High Street, for about two hours after his Lordship's and Mr Alexander's death.

The Earl of Marr's evidence, in most things substantial, corroborated that of the Duke of Lennox.

The Abbot of Inchaffrey deposed, That he saw Mr Alexander Ruthven at Falkland in conference with the King, for about a quarter of an hour, on the morning of the 5th of August. The deponent accompanied his Majesty to Perth, and dined in the

Earl

Earl of Gowry's. After dinner, the deponent heard that the King had taken horſe, and was gone towards Falkland, and the Earl aſſured the company it was ſo; upon which the Duke of Lennox, the deponent, &c. called for their horſes. As they waited for them, they heard a voice, and the Duke ſaid, 'Yon 'is his Majeſty's voice, be where he will.' Immediately they ſaw his Majeſty looking out of a window, without his hat, his face red, and crying, 'Help, my Lord Marr! Treaſon! Trea-'ſon! I am murdered!' 1600

The Abbot of Lindores depoſed in all things, agreeable to the evidence of the Duke of Lennox; adding, that, when the company aſked if the King was gone forth, the porter ſaid he was not. The Earl affirmed, he had gone out by the back gate; to which the porter replied it was impoſſible, for he had the key of that gate. When the King called out of the window, 'Trea-'ſon!' James Erſkine laid hands on the Earl upon the high-ſtreet; Sir Thomas Erſkine alſo gripped him, ſaying, 'Fie, 'traitor! this is thy deed; thou ſhalt die.' To which Lord Gowry anſwered, 'I know nothing of the matter.' A ſcuffle then enſued: The Earl drew both his ſwords, and cried, 'I 'will either be at my own houſe, or die by the gate;' and, at the head of about thirty perſons, he made his way into the place.

Sir Thomas Erſkine's teſtimony confirmed thoſe of the two preceding witneſſes. He added, that, when he had got into the cloſe, meaning to fly to his Majeſty's aſſiſtance, Sir John Ramſay called to him to come up the *turnpike* * *ſtair* to the very top. When he had got up five ſteps, he met Mr Alexander Ruthven, who was bleeding in the face and neck. Sir Hugh Herries, and others

* The name given to a winding ſtair, very common in Scotland.

1600 others who were with him, cried, 'This is the traitor! ſtrike 'him!' He was ſtruck accordingly, and fell; and, as he was fallen, he turned his face, and cried, '*Alace! I had not the* * *wite* '*of it!*' The deponent then went up ſtairs to the chamber at the head of the gallery, where were the King and Sir John Ramſay only; Sir Hugh Herries and a ſervant followed him; immediately after, Mr Thomas Cranſton entered the chamber with his ſword drawn, the Earl of Gowry following, with a drawn ſword in each hand, and a helmet on his head. They ſtruck at the deponent and his colleagues, who defended themſelves and ſtruck again, and Cranſton wounded the deponent in the right hand. At laſt, Sir John Ramſay gave the Earl a deadly ſtroke. The Earl leaned to his ſword; a man held him up; but how ſoon his Lordſhip fell, Cranſton and the reſt of his followers left the room.

Sir John Ramſay depoſed, that, after having dined on the day libelled in the Earl of Gowry's, he took his Majeſty's hawk from John Murray, in order that the ſaid John might dine. Miſſing the King, he and the Laird of Pittencrief ſearched for his Majeſty in different apartments; and, when they came into the cloſe, Mr Thomas Cranſton told them the King was on horſeback, and at the Inch. The deponent then run to the ſtable for his horſe, and, as he was at the ſtable-door, he heard the King's voice, but did not underſtand what he ſaid. He immediately returned, and, entering the cloſe, he found a *turnpike* † *door* open, into which he entered and went up ſtairs. Hearing a ſtruggle and din of feet, he run with his whole force againſt the door which enters from the ſtair to the chamber at the end of the gallery. Having burſt open the door, he ſaw the King and Mr

* Blame of it. † Door of a turnpike ſtair.

Mr Alexander Ruthven ſtriving and wreſtling; his Majeſty having Mr Alexander's head under his arm, and Mr Alexander, who was almoſt on his knees, had his hand upon the King's face and mouth. His Majeſty, ſeeing the deponent, cried, 'Fie! 'ſtrike him *laigh*, becauſe he has an *pyne* * *doublet* upon him.' Immediately the deponent caſt the hawk off his hand, drew his hanger, and ſtruck Mr Alexander, and the King inſtantly puſhed Mr Alexander down ſtairs. In the reſt, he depoſed in all points conform to Sir Thomas Erſkine. 1600

Robert Chriſtie, porter to the Earl of Gowry, ſaw my Lord Duke, the Earl of Marr, and the Earl of Gowry, come into the *cloſe*. My Lord Duke aſked the deponent, if the King was gone out? He ſaid, Not. Then Lord Marr ſaid, 'Billy, tell me 'the verity if his Majeſty be furth or not?' He anſwered, 'In 'truth he is not.' The Earl of Gowry, looking at him with an angry countenance, ſaid, 'Thou lie; he is furth at the back 'gate, and through the Inch.' Then this deponent anſwered, 'That cannot be; for I have the key of the back gate, and all 'the gates of the place.' Then the deponent ſaw his Majeſty looking out of the window of a turret, crying, 'Treaſon!' &c. Upon which the Duke, Lord Marr, and others, ran up the turnpike ſtair to the gallery. After this Lord Gowry came from the high-ſtreet into the cloſe, a ſteel-bonnet on his head, a drawn ſword in his hand, accompanied by ſundry perſons, all with drawn ſwords. My Lord and his followers ruſhed up the *turnpike* ſtair; but the deponent knows not what paſſed within *the place*, ſave by report; nor knows he any more of the matter.

John Graham of Urquhill depoſed 'conform to the Lord 'Duke

* *Pyne doublet* was an under coat of defence, made of wire, to ſhield from the point of a dagger. It was worn by *pions*, or foot ſoldiers.

1600 'Duke of Lennox and Earl of Marr, in all things, *reddens eandem causam scientiae.*'

John Graham of Balgowan deposed in all things conform to the Duke of Lennox.

Twenty-two more witnesses depose either in confirmation of the preceding evidence, or to other facts of less moment. In the whole of the depositions, there is not a word of the Earl's belt and magic characters *, nor of his not bleeding till the belt was

* In the account that was published soon after the conspiracy, both these facts are mentioned, and probably they were both true. From these, two very different conclusions have been drawn, by the ignorance of those who believed, and the partiality of those who discredited the conspiracy; the one, *that the not bleeding of the wound was owing to the magical characters;* the other, *that this tale is so absurd, as to excite strong suspicion concerning the reality of the conspiracy.* The *real matter had been simply this:* Lord Gowry received the deep and mortal wound by the thrust of a *small sword,* and he had not immediately bled externally; but, on his clothes on his belt being taken off, and the body being turned into different postures in the stripping, *the blood had gushed out.* Besides, it frequently happens that, on a person's being blooded after sudden death, no blood will issue for some time; but, when the serous part of the blood separates from the grumous, the former will flow out of the wound. This the fond friend often looks on as the mark of returning life, while it is the most certain indication of death.—Necromancy at this period reigned with uncontrouled sway over the gloomy empire of darkness. A belief in the power of charms, and talismans, has prevailed in a greater or lesser degree in most ages and nations: A *judicious sceptic,* therefore, will not ground his disbelief of a *natural event,* because the ignorant witness who testifies it, ascribes it to a *preternatural cause.* An incident, much more remarkable than Lord Gowry's not bleeding till his belt was unloosed, is authenticated in the trial of Philip Stansfield for parricide, A. D. 1688; a trial which it would be superfluous in me to publish, as a proper abridgment of it has already been made by Salmon. James Muirhead surgeon, in the course of this trial, deposed, 'That, upon the prisoner's assisting to lift the body 'of his deceased father Sir James Stansfield, after it had been sewed up, and clean 'linen put on, *it darted out blood through the linen, from the left side of the neck, which* '*the*

was unloosed, and of the summons against the Earl of Gowry's heirs, and the indictments against his followers who were executed at Perth. 1600

The parliament pronounced a sentence, declaring the late Earl of Gowry and Mr Alexander Ruthven to have committed manifest treason in all points contained in the summons; and, therefore, decerning their name, memory, and dignity, to be extinguished; their arms to be cancelled; their whole estate, real and personal, to be forfeited, and annexed to the crown; their bodies to be taken to the Cross of Edinburgh, and drawn, hanged, and quartered; the name of Ruthven to be abolished; and their posterity, and their surviving brethren, to be incapable of succeeding to, or of holding any offices, honours, or possessions *.

E The

'*the panel touched; but that when he (the witness) and the other surgeon put on the*
'*linen, and stirred and moved the head and neck before, he saw no blood at all.*' This is confirmed by another witness; and it is worthy of remark, that Sir James was not stabbed or shot, but strangled; *Salmon's State Trials, p. 610.*

* How different this sentence, how different the execrable law of Arcadius and Honorius, upon which it is founded, from the following law of our brave, our free ancestors, the Goths, whom we, notwithstanding, call Barbarians! 'Omnia crimina 'suos sequantur auctores. Nec pater pro filio, nec filius pro patre, nec uxor pro 'marito, nec maritus pro uxore, nec frater pro fratre, nec vicinus pro vicino, nec 'proquinquus pro proquinquo, ullam calamitatem pertimescat. Sed ille solus judice'tur culpabilis, qui culpanda commiserit; et crimen cum illo qui fecerit moriatur: 'Nec successores aut haeredes pro factis parentum ullam calamitatem pertimescant.' Leges Wisegothorum, Lib. 6. tit. 1. L. 8. The reader may compare the above with a certain other law, which his reflection will suggest to him.—This sentence, in one particular, exceeded the capricious cruelty of the Roman Emperors, viz. in the insult offered to the dead bodies. Sticking the head and limbs of traitors upon poles, or hanging the body in chains, is a refinement of modern tyrants. 'Corpora eorum qui capite damnantur, cognatis ipsorum neganda non sunt. Eorum 'quoque corpora qui exuriendi damnantur, peti possunt: Scilicet ut ossa et cineres 'collecta sepulturae tradi possint.' Digest. Lib. 48. tit. 24. l. 1.

1600 The Parliament at the ſame time pronounced a ſimilar ſentence on Alexander and Henry Ruthvens, ſons to the Laird of Freeland, Hugh Moncrieffe brother to the Laird of Moncrieffe, and Patrick Eviot brother to the Laird of Balhouſie. And, on the 22d of Auguſt preceding, three of their accomplices, Mr Thomas Cranſton *, and George Craigengelt, ſervants to the Earl of Gowry, and John Macduff, who with their drawn ſwords had ruſhed up the turnpike with the Earl of Gowry, and aſſaulted Sir Thomas Erſkine, &c. on a proof led, as well as their own confeſſions, were convicted before the Court of Juſticiary at Perth, and executed that ſame day.

I have thus preſented the ſimple evidence, and without arguments to enlighten, or ingenuity to perplex the caſe, I apprehend the reader has already formed his opinion, whether this was a *plot of Gowry's againſt the King, or of the King againſt Gowry.*—I ſhall now ſtate the following arguments, *which impreſs me with the moſt complete conviction, that it was a plot of Gowry againſt the King.*

Argument 1ſt, That an attempt upon the King's perſon was neither uncommon nor unlikely. This will be beſt evinced by a liſt of the various attempts made by King James's ſubjects on the perſon of their Sovereign.

1ſt Attempt, 24th May 1578. The Earl of Morton, one of the murderers of the King's father, ſeizes the King and the caſtle of Stirling †.

2d

* Lord Gowry had not made theſe three acquainted with his plot, nor had they any other ſhare in the guilt but joining their maſter with drawn ſwords. Records of Juſticiary, Auguſt 22. 1600.

† Robertſon's Hiſtory of Scotland, vol. 2. p. 62. Arnot's Hiſtory of Edinburgh, p. 34.

2d Attempt, 23d Auguſt 1582. William Earl of Gowry, father to the Earl, whoſe trial I preſent, at his own houſe of Ruthven, with the aid of other Lords, ſeizes the King, changes his miniſters, and keeps him in ward about a twelvemonth. This the church voted to be a good and acceptable ſervice to God, the King, and the country. 1600

3d Attempt *. Francis Earl of Bothwell, nephew to James Earl of Bothwell, who was one of Darnley's murderers, aided by ſome Popiſh Lords, aſſemble at Quarrel-holes ‡, with a number of perſons, for the purpoſe of ſeizing the King in his palace of Holyroodhouſe, murdering the Chancellor, and overthrowing the eſtabliſhed religion.

4th Attempt, 27th December 1591. The ſame Earl of Bothwell, James Douglaſs || of Spott, and about forty accomplices, ſurpriſe the palace of Holyroodhouſe, while the King and Queen are

* Rec. of Juſt. 24th May 1589. Spottiſwood's Hiſt. p. 376.——It is worthy of remark, that Logan, in his letter to Lord Gowrie, of the 29th July 1600, on the ſubject of the intended conſpiracy, when ſpeaking of the Earl of Bothwell, uſes theſe words: 'In caſe God grant us happy ſucceſs in this errand, 'I hope to have *both your Lordſhip, and his Lordſhip, with many others of your lovers, 'and his*, at a good dinner, before I die.'

‡ Cloſe by the village of Reſtalrig, about a mile diſtant from Holyroodhouſe.

|| Son-in-law to George Home of Spott, who was tried for the murder of Darnley, and who afterwards was one of the jurymen who ſat on the trial of Archibald Douglaſs for the ſaid murder. By the bye, this George Home of Spott was himſelf murdered, not without great ſuſpicion of the murder being perpetrated by the ſaid James Douglaſs, his ſon-in-law and ſucceſſor. Douglaſs's inducement to join the conſpiracy, was to relieve his ſervants who were confined within the palace; and who next day were to be put to the torture concerning the murder of his father-in-law. Johnſtoni Rer. Brit. Hiſt. p. 158. Spottiſwood's Hiſt. p. 386. Moyes's Memoirs, p. 180.

1600 are at ſupper, break open the Chancellor's, and aſſault the royal apartments, kill John Schaw his Majeſty's principal equerry, and call for fire to conſume ſuch of the doors as they could not break up; but are repulſed by Sir James Sandilands and the citizens of Edinburgh: And eight of the conſpirators hanged next morning, without jury, on a gallows erected before the palace gate.

5th Attempt, 28th June 1592. *The ſame Earl of Bothwell, the Maſter of Gray*, and others, who, in a few months after, were detected in a freſh conſpiracy with the Court of Spain, for invading Scotland and England, aſſault the King in the palace of Falkland at midnight; but, by reſiſtence * of thoſe within, and by the country, on the early rumour of danger, riſing in his Majeſty's defence, they are forced to abandon the enterprize; they plunder the royal ſtables and park of the horſes, and betake themſelves to flight. Several of the conſpirators are ſlain in the purſuit, or hanged. *The Maſter of Gray* is pardoned, that he might have the opportunity of giving additional proofs of his treachery. †

6th

* Great Seal Record, Book 40. No. 21. 15th Aug. 1593. Pardon to the Maſter of Gray, his uncle, and two brothers, and to James Graham, brother to the late Laird of Fintry, for treaſonably attacking the King's perſon and the palace of Falkland. Johnſtoni Rer. Brit. Hiſt. p. 168. Moyes's Memoirs, p. 188. ——To ſhow how groſsly the ſacred principle of religion was proſtituted, how it was a mere maſk put on to hide the ambition or avarice of thoſe Nobles, whoſe piety even modern hiſtorians have not been aſhamed to celebrate; it is not incurious to obſerve, that Nobles, of the Popiſh and Preſbyterian religions, frequently united in the ſame conſpiracies. 'The wolf and the lamb ſhall *feed* together.' Iſaiah, ch. 65. v. 25. The flames of London, in the year 1780, gave a fatal and memorable teſtimony of the deluſion and outrage, which, under the pretence of religion, may ſtill be excited by a champion of the covenant.

† There were other attempts of leſs note upon the King's perſon, which I paſs over.

6th Attempt, 17th December 1596. The rabble of Edinburgh, instigated by the clergy, and countenanced * by the Lords Lindesay and Forbess, assault with great fury the tolbooth of Edinburgh, in which are the King, his ministers and judges; but are repulsed, or appeased by the magistrates, and more respectable citizens. 1600

7th Attempt, 5th August 1600, *by John Earl of Gowry, and Mr Alexander Ruthven, on the person of the King, in the Earl's own house of St Johnston.*

Argument 2d. That the Earl of Gowry was by no means an unlikely person to make such attempt.

Lord Gowry had the misfortune to be born in a country which had been recently stained with a deed of the most diffused and complicated foulness, of any that disgraces the annals of the most corrupt and profligate Court. The Prince under whom he lived, possessed no solid nor permanent authority; nor did his ideas of prerogative correspond with the extent

* Arnot's History of Edinburgh, p. 43. Moyes's Memoirs, p. 249.—— When Ogilvy the Jesuit was brought to trial, his judges, or rather inquisitors, interrogated him about the Pope's right to depose excommunicated princes, and if it was lawful to put such princes to death. In answering these interrogatories, he reproached the court with this attempt. After saying it was not papists but heretics, who inculcated parricide, he goes on thus: 'Pulveraria conspiratio 'aulicorum fuit, at non sic cum die Septembris vestra (it should be Decembris) 'quando ingenti armatorum manu regem in Praetorio cum Senatu necare voluistis, 'quod et fecissetis nisi concursu opificum satellites adjuti e manibus vestris regem 'eripuissent. *Duo millia sunt hodie Edinburgi qui illo die arma tulerunt*, et tot esse 'possunt testes, *tres predicantes exhortatos fuisse ad fortiter agendum, clamantes, Deus 'et ecclesia;* cum ex altera parte clamaretur *pro Deo et Rege; pro quo facto Edinbur- 'gum debebat comburi.*' Relatio incarcerationis et martyrii Joannis Ogilbei, &c. typis viduae, L. Kellami, 1615. See his trial below.

1600 tent of his power; for he deemed the *Royal pleasure* to be the standard for measuring out law to the subjects. The people, on the other hand, enjoyed no regular system of liberty, yet were extremely destitute of the respect due to the Sovereign. The turbulent nobles, in gratifying their common pursuits, ambition, and revenge, were restrained by no delicacy of sentiment, no politeness of manners. The clergy held the pulpit to be a sanctuary from which they might declaim without challenge on matters of state; and their bold sentiments, their lofty pretensions, were often unfolded in the most coarse and intemperate language. To add to the public disorder, the kingdom was distracted between two foreign factions, and two rival religions. The Spanish faction united with the Popish; the * English, with the Presbyterian. The Prince, who guided the car of state over those arduous paths, increased the confusion by his inability to direct it. From a want of judgment, of resolution, and of temper, he frequently connived at, or pardoned the most atrocious crimes, while he punished, with illegal and † excessive rigour, trivial or imaginary offences. Equally unskilled to hurl the imperial thunder, or to encircle his temples with the rays of mercy, he weakened moral distinction, while he broke down the barriers to the commission of the more atrocious crimes.

The murder of Riccio, by Lord Gowry's grandfather, was perhaps the greatest insult ever offered to a woman and a Sovereign, and may be deemed the harbinger of the succeeding tumults.

* It is highly probable that some persons in the Court of England were privy to this conspiracy. In a letter of Logan's, which is ingrossed in the indictment against George Sprott, who was executed for concealing this conspiracy, there is this passage: 'I trust, and am assured, we shall hear word within few days from 'them your Lordship knoweth of; *for I have care to see what ships comes home by.*' Records of Justiciary, August 12. 1608.

† See the Index, articles Tennent, Cornwall, Fleming, Guthrie, Maccalzeane, Ogilvie, Rois, Sandilands.

mults. And the Earl's father, when he ſeized the King at Ruthven, changed his miniſters, and kept him in ward for a twelvemonth, ſhowed that his reſpect for Princes was not much greater than his father's. 1600

This Earl ſoon after fell upon the ſcaffold, and in his death we may probably look for the principal motive to *Gowry's Conſpiracy*. The Church, in a ſolemn act of their Aſſembly, declared their approbation of the elder Gowry's ſeizing the King at Ruthven; and the Preſbyterian clergy, in their writings and declamations, always enforced this topick, and expreſſed their opinion, that he fell by an unjuſt ſentence. One of the moſt eminent and popular of that order was preceptor to Lord Gowry and his brothers. Thus the idea of a murdered father, inſtilled * in the converſations of their preceptor, and ſupported by the authority of the Church, muſt have made a deep impreſſion on the youthful minds of the offspring of Gowry. This, indeed, is not ſimply ſupported by plauſible conjecture; it is inſtructed by evidence. When Alexander Ruthven approached the King with a drawn hanger, his words were, '*remember on my father's death.*' The ſame is corroborated by Logan's letters; letters which, from the proof adduced in the following trial, I hold to be *authentic evidence*, particularly in the following paſſage †: 'I think there is 'none of a noble heart, or carries a ſtomach worth a penny, but 'they

* To exclude miſrepreſentation, I deſire it may be underſtood, I neither wiſh to inſinuate, nor do I believe, that Lord Gowry's preceptor, or any of the clergy, inſtilled into his mind to revenge his father's death; but only, that they muſt have repeatedly told him his father fell by a hard ſentence; and that his mind brooding over this, joined to his ambition, and the ſtate of the country, probably ſuggeſted to him this conſpiracy againſt the King, which terminated in the ruin of himſelf and of his family. Logan's Letters, No. 5. would completely vindicate Lord Gowry's preceptor from ſuch aſperſion.

† Logan's Letters, No. 5. *ult.* July 1600.

1600 ' they would be content and glad to see an contented revenge of ' *Greysteil's* * death.'

The family of Ruthven had long been looked upon as the head of that party which was attached to England and the Reformation; and the accomplishments of the latter Gowry qualified him to be the leader of an enterprising faction. The importance he derived from aristocratic influence over his extensive domains, and from the attachment of a powerful party in Church and State, was embellished with the lustre of a royal descent †. Thus

* A nickname for the elder Gowry.

† William, second Lord Ruthven, the Earl's great grandfather, married Janet Halyburton, eldest daughter, and co-heiress of Patrick Lord Haliburton of Dirleton, whose predecessor, Sir Walter Haliburton, married Lady Isabel Stuart, eldest daughter of Robert Duke of Albany regent of Scotland, third son of King Robert II. The Earl's father, William first Earl of Gowry, married Dorothea, daughter to Henry Lord Methven, who was first married to the Princess Margaret of England, daughter of Henry VII. and widow of James V. It is said Lord Gowry propagated a rumour of his mother's being descended of that marriage, and that many low people about Perth credited the report; (Scot's Hist. of Scotland, p. 553.). Yet it seems demonstrated that she was sprung of a marriage between Lord Methven and Janet Stewart, daughter of John Earl of Athole. Douglass's Peerage, p. 16. 305. 321. Lord Gowry adopted into the arms of his family, A. D. 1597, *a sword pointing towards an imperial crown, with the motto*, ' *Tibi soli*;" Crawfurd's Peerage, p. 166.

I am induced to believe that, however atrocious Lord Gowry's purpose might be, he did not intend to despatch the King immediately. The evidence of what passed between the King and Alexander Ruthven, as well as a consideration of the most wary steps Gowry could pursue, confirm this notion. Ruthven's speech to the King was, ' *Sir, You must be my prisoner*;' and, when he returned a second time, and swore there was no remedy, instead of stabbing the King, he only proposed tying his hands. Whether the brothers consulted their ambition or their safety, it was prudent for them not to despatch the King at St Johnston. The notorious murderer of the King could have little hope of ascending his throne. By throwing

Thus ambition, as well as revenge, might ſtimulate Gowry to his daring enterpriſe. Indeed, if his attempt was to be directed againſt the life of the King, it could no longer be ſafe for him to remain in the condition of a ſubject: And the indecent and malicious imputation of baſtardy, with which the fanatics reproached King James, might afford a plauſible pretext for ſecluding the royal offspring. 1600

The family of Hamilton, next heir to the Crown, had long loſt its popularity, and the Earl of Arran, its head, had loſt his judgment; and, although there undoubtedly were ſeveral families interpoſed between Gowry and the Crown, in the ſtrict line of ſucceſſion, none of them probably poſſeſſed power and popularity to ſupport their right. But, if Gowry and his brother were really endowed with thoſe perſonal accompliſhments which have been ſo highly extolled, and which made their countrymen conceive '*the moſt ſanguine* * *hopes of their early virtues*.' Is it abſurd to ſuppoſe Lord Gowry to have flattered himſelf, that, in a country where *the church was in danger*, where the

 trumpet

ing the bloody taſk upon the hands of an aſſaſſin, at an after day, they might ſhift off the imputation of the parricide; and their partizans might deny, with as much effrontery, that Gowry committed the murder, as they have ſince done that Gowry hatched a conſpiracy. Beſides, while the King remained in cuſtody of the brothers, his life was a hoſtage for their ſafety, and a check upon any ſpirited meaſures in the adherents to the royal cauſe. The houſe of St Johnſton was but a few yards from the river Tay. Had Lord Gowry been ſucceſsful in his *actual* attempt to diſmiſs the King's followers, by telling them the *willful falſehood* that his Majeſty was gone; had the ſhades of night fallen, he might have conveyed the King down the Tay, with equal eaſe and ſecrecy; and his Majeſty might either be carried priſoner to England, where his mother had ended her days, or to Logan's houſe of Faſtcaſtle, on the coaſt of Berwick, where Logan boaſts that he had 'keeped my Lord Bothwell in his greateſt extremities, ſay the King and his council what they would.' Logan's Letters, No. 4.

* Robertſon's Hiſt. of Scot. v. 2. p. 252.

1600 trumpet of sedition was sounded by the ministers * who fortified the '*chief block-house of the Lord's Jerusalem*,' his piety, popularity, and bravery, should supply the defect in title, and make him be called, while there were nearer heirs to the Crown; as has since happened, in the same country, on a similar occasion.

Sundry dark expressions in Logan's letters, particularly, that the estate of Dirleton † was to be bestowed on him, if Lord Gowry's scheme should take effect, confirm the notion that his Lordship aimed at the Crown.

Argument 3d, That the circumstances of the 5th August, as established in proof, are consistent ‡ with a plot of Gowry against the

* *Vulgo—The Ministers of Edinburgh!* Calderwood's Hist. of the Church, written by appointment of the General Assembly, p. 447. † The Gowry family acquired the estate of Dirleton, one of the best in East Lothian, by the marriage of Lord Ruthven with a daughter of Lord Haliburton. ‡ A celebrated historian has endeavoured to invalidate the testimony of Gowry's conspiracy, recorded before Parliament, by remarking certain discrepancies and contradictions between this testimony and the account of the plot published by the King, recently after the event; and likewise between the evidence given by Henderson before the Privy Council, and that afterwards emitted by him before Parliament. In some of these, he points out discrepancies so trifling, as with me rather tend to strengthen the candour and credibility of the evidence. I present an instance: 'The King asserts, that 'Henderson opened the window during Mr Ruthven's absence, Disc. 23. Henderson deposes that he was *only attempting to open it* when Mr Ruthven returned; 'and that, during the struggle between the King and him, he opened it.' Robertson's Hist. v. 2. p. 270.—Such are the conceptions and faculties of man, that it is *morally impossible* for twenty or thirty persons who witness, much more who are concerned in a busy scene of violence and danger, to give a precisely similar account of every minute circumstance; and, were an account tallying so wonderfully to be given in evidence, with me it would destroy the credibility of the whole. The various depositions in the trial of Gowry, in my humble opinion, are very distinct and consistent.

the King, and incompatible with a deſign of the King againſt Gowry. 1600

Of this, I think, any impartial mind may be ſatisfied, by a bare peruſal of the evidence. I ſhall, therefore, briefly obſerve, that it is inſtructed by Alexander Ruthven's coming to Falkland, and taking the King along with him to his brother's houſe of St Johnſton; by the King's ſetting out immediately after the chace, without ſo much as a ſword; by the ſlightneſs of his Majeſty's retinue; by the Duke of Lennox, Lord Gowry's brother-in-law, being of the party; by the ſuſpicions which the King expreſſed to the Duke, bidding him take heed and follow him; by Alexander Ruthven's ſeparating the King's attendants from him, on the falſe pretext of his Majeſty's commands; by his locking the doors as the King and he went up ſtairs, thereby ſecluding all followers; by Lord Gowry's attempting, in the mean time, to get the King's ſuite ſent back to Falkland, for which purpoſe he aſſeverated the falſehood, that the King was on horſeback and away; and, by the King's being reduced to ſuch diſtreſs, as to ſtretch his neck forth of a window, at the top of the houſe, his face red, a hand gripping his cheek, and himſelf crying, 'Treaſon! Help! I am 'murdered!'—I ſhall only add, that, if the King had entertained any bloody deſign againſt Gowry, it was ſafer, both to his perſon and government, and more ſuitable to his timid counſels, to have taken off Gowry by the dagger of a bravo, or by inveigling him into a plot againſt the ſtate, than by going in perſon alone, and unarmed, into the ſecret chambers of the caſtle of the greateſt baron in the kingdom, there to have murdered him, ſurrounded by his domeſtics, his friends, and his vaſſals, and in the center of his extenſive domains. And, if the King had, at his devotion, a perſon ſo dexterous in the art of forgery, as he muſt have had, *if Logan's letters are fictitious*, there could

1600 be no difficulty in convicting Gowry of any crime his Majesty might think fit to lay to his charge.

Argument 4th, That the letters of Logan of Restalrig, one of the conspirators, afford a separate incontestible evidence of the reality of this conspiracy.

As this argument rests entirely upon the authenticity of Logan's letters, it falls to be discussed in the following trial of Logan himself:

Having stated the evidence, and the argument, which impress me with the most perfect conviction of the reality of this conspiracy, it may not be amiss to inquire how so strange a delusion, as the doubting of this conspiracy, has been propagated and maintained.

In those days, religion was not that gentle and holy affection which strengthens and purifies the mind, while it humanizes the heart: It was an etherial fluid which pervaded the whole mass of the constitution; and whose electric shocks served sometimes to purify, and sometimes to consume: And the political atmosphere, strongly impregnated with the flame, often burst forth in thunder. Whatever the clergy were pleased to inculcate was swallowed with the most stupid and greedy faith; and, from the invariable principles of human nature, I may venture to assert they were the less studious of plausibility in their doctrines, in proportion to the simplicity of their flock.

It

It had pleased the clergy to pass a solemn act of approbation of the Elder Gowry's apprehending the King, although it was nothing less than an act of open and manifest rebellion. Is it then wonderful that those who justified the successful rebellion of the father, should deny their belief of the disappointed treason of the son *? When the ministers of Edinburgh were desired to assemble the people, to lay before them the particulars of the plot against the King, and to praise God for his delivery, they refused obedience, alledging that they could not deliver from the † *chair of truth*, a relation of facts concerning which they themselves were dubious. And Mr Robert Bruce, a bold and popular preacher, persisting in his denial, notwithstanding the arguments, the entreaties, and the threatenings of the King, was banished for his disobedience. The spirit of incredulity naturally spread from the pastor through the flock, and it continued to be fostered by the more bigotted of the clergy during the civil wars, which rent the state for a great part of the last century: Indeed, with the different factions, a belief or disbelief in Gowry's conspiracy, became a touchstone of party. When the nation was no longer distracted by virulent contention between church-man and covenanter, loyalist and republican, whig and jacobite; when the minds of men were disposed to receive the truth, a circumstance purely accidental has tended to continue this delusion. An eminent historian appeared, whose writings have stamped a deserved impression upon the opinions of the public. Attached to the *order* to which he belongs, it was natural for him to entertain a higher respect for the opinion and authority of those fathers of the church than they deserved, and consequently to imbibe 1600

* To deny the reality of plots, unless the treason was sealed with the blood of the Prince, was no new matter: 'Conditionem Principum miserrimam aiebat '(Domitianus) quibus de conjuratione comperta non crederetur, nisi occisis.' Suetonius Delphini, p. 595.

† Calderwood's History, p. 444.

1600 imbibe in part their ſceptical notions concerning Gowry's conſpiracy. Theſe he has delivered with a ſubtilty of argument, an engaging and perſuaſive manner, which captivate the attention, and rivet the wavering opinion *, while perhaps they are unable to convince upon a ſolid inveſtigation of the judgment.

Robert Logan of Reſtalrig, for Acceſſion to Gowry's Conſpiracy.

IN the year 1608, George Home, Earl of Dunbar, was informed by a gentleman of his acquaintance, that there was one Sprott, a notary at Eyemouth, who had communicated to him ſome particulars relative to Gowry's conſpiracy, which this

* Human nature is liable to error, from partiality of affection, as well as frailty of judgment; but *candour* is in every man's power. It is therefore my duty to obſerve, that inconteſtible evidence is recorded in the books of *Sederunt* of the Court of Seſſion, of the Earl of Gowry, at the time of his death, being creditor to the King in L. 196,465 : 18 : 6, of accumulated ſum of principal and intereſt. By the King's inability to pay him, the Earl was ſo much embarraſſed in his circumſtances, that the Court of Seſſion granted him for a twelvemonth a perſonal protection from the diligence of his creditors, juſt forty-ſix days before he was killed. And from the common law, as well as the ſilence of the public records, it is probable the Earl's creditors were never paid. I am aware that this fact may make a forcible impreſſion upon thoſe who have been accuſtomed to doubt of the reality of this conſpiracy. But a conſideration of the following circumſtance will entirely remove every ſuſpicion. Lord Gowry was creditor to the King in this ſum, as repreſenting his father, the late Earl, who was Treaſurer of Scotland, and that, by accompt fitted on the 10th of May 1583, the balance then reſting to the Earl being L. 48,063 : 4 : 8 Scots, which (as Scottiſh money was greater by the half at that time than it is now) was L. 72,094 : 17 : 0 of our preſent Scottiſh money of principal, beſides ſeventeen years

this Sprott had kept secret till the persons concerned in it were * dead. The Earl acquainted the Lord Advocate, and Sprott was instantly apprehended. He was examined before the Privy Council on the 5th of July 1608, and afterwards underwent frequent examinations. His voluntary confession was made the subject of an indictment against him before the Court of Justiciary, as being in the treasonable foreknowledge of Gowry's conspiracy. He was tried capitally on the 12th of August 1608, *upon his own confession alone*. He was convicted. He was condemned to be hanged that very day at the cross of Edinburgh, and his head to be put up on the tolbooth, beside the traitor Gowry's. He confessed he perfectly knew that Logan of Restalrig was in the foreknowledge of Gowry's conspiracy: That letters passed between the Earl and Restalrig on the subject, in the beginning of

1600

years interest at the then rate of ten *per cent*. On the 4th of May 1584, the elder Gowry was convicted, condemned, and beheaded for treason, and his estate forfeited. King James, by a solemn act, restored his son, the latter Gowry, against the forfeiture, and ratified the debt he owed him, which that forfeiture had proscribed, in December 1585. The personal protection to Gowry was granted on the 20th of June, and his Lordship was killed on the 5th of August 1600. Can it therefore be alledged that the King made an attempt upon Gowry, with a view of getting quit of this debt, without maintaining that his Majesty restored to the heir, the estate of a person justly condemned, that he might afterwards murder the innocent heir, in order to wrest back the estate he had conferred from his royal clemency? Gowry was restored by two acts of the parliament, which sat on the 1st, 4th, and 10th December 1585; the one a general act of indemnity and restoration *of all persons who had* been forfeited since the King's coronation, excepting the murderers of Darnley, and some others. The other was a special statute in favour of the widow and children of William Earl of Gowry. MSS. Acts of *Sederunt*, Vol. iv. 20th June 1600; Records of Parliament, 1st, 4th, 10th, December 1585; Spottiswood's Hist. p. 331. See the Act of Sederunt which I have printed in Appendix, No. 1.

* Logan of Restalrig, and his servant Laird Bour, died about the year 1606.

1600 of July 1600; that a ſervant of Reſtalrig's, commonly called *Laird Bour*, was the meſſenger employed in theſe deſpatches, had ſome of them in his keeping, and ſhowed them to the priſoner in the houſe of Faſtcaſtle, among other papers, he Bour, being unable to read, and that he took the opportunity to ſecret them *. He confeſſed that he was often in company with Reſtalrig, as well as with Laird Bour, heard the conference which paſſed between them relative to a letter which Bour had brought back to his maſter from Lord Gowry: That he afterwards inquired of Bour what was going on between his maſter and the Earl of Gowry? to which Bour anſwered, 'He believed that the Laird ſhould get Dirleton without either gold 'or ſilver, but feared that it ſhould be as dear unto him; and 'Sprott inquiring how that could be? Bour ſaid, they had another pye in hand nor the ſelling of any land; but prayed Sprott, 'for God's ſake, he would let be, and not trouble himſelf about the 'Laird's buſineſs; for he feared, within few days, the Laird would 'be either landleſs or lifeleſs.' By this declaration he uniformly abode. He adhered to it on the ſcaffold, when he was performing the laſt ſolemn duties of penitence and prayer; and he declared that he ſhould give the people a ſignal of its truth after he was thrown over the ladder; accordingly, to the aſtoniſhment of the ſpectators, he clapped his hands thrice when he was ſuſpended on the gallows. All this is teſtified in the Records of Parliament under the ſubſcription of the Lords of the Privy Council, the

* The ſummons of forfaulture againſt Logan's heirs, explains more particularly how Sprott came by theſe letters: That Laird Bour, when he got them back from the Earl of Gowry to be returned to Reſtalrig, detained the letters; that Sprott ſtole them from him, and Reſtalrig becoming apprehenſive that Sprott or Bour would betray him, bribed them both with many preſents, to keep the ſecret. See an excerpt from this ſummons in Appendix, No. 2.

the Archbishop of Glasgow, many noblemen, and the magistrates and ministers of Edinburgh, who were upon the scaffold during the time of his execution. 1600

The *queue* being thus given to Restalrig's guilt, a summons of treason was executed against Robert Logan, his eldest son and heir, and all others concerned, on the 15th of February 1609, to appear before the King and estates of Parliament, on the 12th of April, and defend themselves from the charge of high treason exhibited against the late Logan of Restalrig.

The cause was brought before Parliament on the 24th of June, and his Majesty's Advocate, for proving of the charge, produced George Sprott's declarations *, and confessions before the Privy Council, the Court of Justiciary, and on the scaffold. His Lordship also produced the depositions of witnesses examined before the Privy Council, and the Lords of Articles; and the following letters of the deceased Logan of Restalrig.

LETTER I.

Right Honourable Sir, my duty, with service remembered: Please you understand, my Lord of *Gowrie*, and some others his Lordship's friends and well-wishers, who tenders his Lordship's preferment, are upon the resolution, you know, for the revenge of that cause: And his Lordship has written to me anent that purpose; whereto I will accord, in case ye will stand to, and bear a part; and before ye resolve, meet me and Mr *Alexander Ruthven*, in the *Canongate*, on *Thursday* the next week; and be as

 warry

* Register of Parliament, 24th June 1609.

1600 warry as you can. Indeed, Mr *Alexander Ruthven* ſpoke with me four or five days ſince, and I have promiſed his Lordſhip an anſwer within ten days at fartheſt. As for the purpoſe, how Mr *Alexander Ruthven* and I has ſet down the courſe, it will be a very eaſy done turn; and not far by that form with the like ſtratagem whereof we had conference in T. S. But in caſe you and Mr Alexander Ruthven forgather; becauſe he is ſomewhat uncautious, for God's ſake beware with his rackleſſneſs as to this of *Padua;* for he told me one of the ſtrangeſt tales of a Nobleman * of *Padua* that I ever heard in my life, reſembling the like purpoſe. I pray you, Sir, think nothing, although this bearer underſtand of it; for he is the ſpecial ſecretary of my life; his name is *Laird Bour*, and was old *Manderſton's* man for dead and life; and even ſo now for me. And for my own part, he ſhall know of all that I do in this world, ſo long as ever we live together; for I make him my houſehold man: He is well worthy of credit, and recommend him to you. Always to the purpoſe, I think beſt, for our plot, that we meet all at my houſe of *Faſtcaſtle:* For I have concluded with *Mr Alexander*, who, I think, ſhall be meeteſt to be conveyed quietly in a boat by ſea; at which time, upon ſure advertiſement, I ſhall have the place very quiet and well provided; and, as I receive your anſwer, I will poſt this bearer to my Lord: And I pray you, as you love your own life, (becauſe it is not a matter of mowſe), be circumſpect in all things, and take no fear but all ſhall be well. I have no will that either my brother, or yet M. N. R. my Lord's old pedagogue, know any thing of the matter, till all be done that we would

* What this ſtory is of a Nobleman of Padua, a learned antiquarian of Italy may poſſibly be able to unfold. I deſpair of ever hearing it. Lord Gowry and his brother, as they travelled for their accompliſhment, paſſed a conſiderable time at Padua.

would have done; and then I care not who gets wit that loves us. When ye have read, ſend this my letter back again with the bearer, that I may ſee it burn't myſelf; for ſo is the faſhion in ſuch errands: And, if you pleaſe, write your anſwer on the back hereof, in caſe ye will take my word for the credit of the bearer, and uſe all expedition; for the turn would not be long delayed. Ye know the King's hunting will be ſhortly; and then ſhall be beſt time, as Mr *Alexander* has aſſured me, that my Lord has reſolved to enterprize that matter. Looking for your anſwer, commits you to Chriſt's holy protection. From Faſt-caſtle, the 18th day of July 1600. 1600

Your's to utter power ready,

RESTALRIG.

LETTER II.

Laird *Bour*, I pray you haſte you weſt to me about the errand I told you; and we ſhall confer at length of all things. I have received a new letter from my Lord of *Gowrie*, concerning the purpoſe that Mr *Alexander*, his Lordſhip's brother, ſpoke to me before; and I perceive that I may have advantage of *Dirleton*, in caſe his other matter take effect; as we hope it ſhall. Always, I beſeech you, be at me, the morn at even; for I aſſured his Lordſhip's ſervant, that I ſhall ſend you over the water within three days, with a full reſolution of all my will, anent all purpoſes; and I ſhall indeed recommend you and your truſtineſs to his Lordſhip, as ye ſhall find an honeſt recompence for your pains in the end. I care not for all the land I have in this kingdom, in caſe I can grip off *Dirleton*; for I eſteem it the pleaſanteſt

 dwelling

1600 dwelling in Scotland. For God's cause keep all things secret, that my Lord, my brother, get no knowledge of our purposes; for I rather be * earded quick. And so looking for you, I rest till meeting.

From the *Canongate*, the 18th day of July.

P. S. I am very ill at ease, therefore speed you hither.

Your's to power ready,

RESTALRIG.

LETTER III.

Right Honourable Sir, all my hearty with humble service remembered, since I have taken on hand to interprise with my Lord of *Gowrie*, your special and only best beloved; as we have set down the platt already, I will request you that you will be very circumspect and wise, that no man get an advantage of us. I doubt not but you know the peril to be both life, lands, and honour, in case the matter be not wisely used; and, for my own part, I shall have a special respect to my promise that I have made to his Lordship and Mr *Alexander*, his Lordship's brother, although the scaffold were set up. If I cannot come to Falkland the first night, I shall be timely in St *Johnston* on the morn. Indeed, I lippened † for my Lord himself, or else Mr *Alexander*, his Lordship's brother, at my house of *Fastcastle*, as I wrote to them both. Always I repose on your advertisement of the precise day, with credit to the bearer; for howbeit he be but ane sillie glyed old carle, I will answer for him, that he shall be very true. I pray you, Sir, read, and either burn or send again with the bearer; for I dare hazard my life, and all I have else in the world, on

* Buried alive.

† I trusted to, I expected the coming of.

on his meſſage, I have ſuch proof of his conſtant truth. So commits you to Chriſt's holy protection. 1600

From the *Canongate* the 27th day of July 1600.

P. S. I uſed not to write on the back of any of my letters, concerning this errand.

Your's to all power, with humble ſervice ready,
RESTALRIG.

LETTER V.

My Lord, my moſt humble duty, with ſervice, in moſt hearty manner remembered. At the receipt of your Lordſhip's letter, I am ſo comforted, eſpecially at your Lordſhip's purpoſe communicated to me therein, that I can neither utter my joy, nor find myſelf able how to encounter your Lordſhip with due thanks. Indeed, my Lord, at my being laſt in the town, Mr *Alexander*, your Lordſhip's brother, imparted ſomewhat of your Lordſhip's intention anent that matter unto me: And, if I had not been buſied about ſome turns of my own, I thought to have come over to *St Johnſton* and ſpoken with your Lordſhip. Yet always, my Lord, I beſeech your Lordſhip, both for the ſake of your honour, credit, and, more than that, that your life, my life, and lives of many others, who may, perhaps, innocently ſmart for that turn afterwards, in caſe it be revealed by any, and likewiſe the utter wrecking of our lands and houſes, and extirpating of our name, look that we be all as ſure as your Lordſhip, and I myſelf ſhall be for my own part; and then I doubt not but, with God's grace, we ſhall bring our matter to an fine*, *which ſhall bring the contentment to us all that ever wiſhed for the revenge*

* To a concluſion.

1600 *revenge of Machivellian massacring of our dearest friends.* I doubt not but Mr *Alexander*, your Lordship's brother, has informed your Lordship what course I laid down to bring all your co-associates to my house of *Fastcastle* by sea, where I should have all materials in readiness for their safe receiving on land, and into my house, making, as it were, but a manner of passing time in an boat on the sea in this fair summer-tide, and no other strangers to haunt my house while we had concluded on the laying our plot, which is already devised by Mr *Alexander* and me. And I would wish that your Lordship would either come, or send Mr *Alexander* to me, and thereafter I would meet your Lordship in *Leith*, or quietly at *Restalrig*, where we should have prepared an fine hatted kit *, with sugar and comfeits and wine, and thereafter confer on matters; and the sooner we brought our purpose to pass it were the better, before harvest. Let not Mr *W. R.* your old pedagogue, ken of your coming. But rather would I, if I durst be so bold to intreat your Lordship once to come and see my own house, where I have keeped my Lord *Bothwel* in his greatest extremities, say the King and his council what they would. And in case God grant us happy success in this errand, I hope both to have your Lordship and his Lordship, with many others of your lovers and his, at a good dinner before I die. Allways I hope that the King's buck-hunting at *Falkland* this year shall prepare some dainty chear for us, against that dinner, the next year, *jocose hoc*, to animate your Lordship at this time: But, afterwards, we will have better occasion to make merry. *I protest, my Lord, before God, I wish nothing with a better heart nor to atchieve to that which your Lordship would fain attain unto;* and my continual prayer shall tend to that effect; and with the large spending of my lands, goods, yea, the hazarding of my life,

* A hatted kit is a dish common in Scotland at this hour. It is a preparation of milk kept for some time. The whey is let off, and the remainder is of a pretty thick consistence, and no unpleasant acidity.

life, ſhall not afray me from that, although the ſcaffold were already ſet up, before I ſhould falſify my promiſe to your Lordſhip, and perſuade your Lordſhip thereof. I trow your Lordſhip has an proof of my conſtancy already or now. But, my Lord, whereas your Lordſhip deſires, in your letter, that I crave my Lord, my brother's mind anent this matter, I utterly diſaſſent from that, that he ever ſhould be an counſellor thereto; for, in good faith, he will never help his friend nor hurt his foe. Your Lordſhip may confide more in this old man, the bearer hereof, my man, Laird *Bour*, than in my brother; for I lippen my life, and all that I have elſe, in his hands; and I trow he would not ſpare to ride to hell's gate to pleaſe me; and he is not beguiled of my part to him. Always, my Lord, when your Lordſhip has read my letter, deliver it to the bearer again, that I may ſee it burnt with my own eyes; as I have ſent your Lordſhip's letter to your Lordſhip again; for ſo it is the faſhion I grant. And I pray your Lordſhip to reſt fully perſuaded of me, and all that I have promiſed; for I am reſolved, howbeit it were to die the morn. I muſt intreat your Lordſhip to expede *Bour*, and give him ſtrait directions, upon pain of his life, that he take never a wink of ſleep untill he ſee me again, or elſe he will utterly undo us. I have already ſent another letter to the Gentleman your Lordſhip knows, as the bearer will ſhow your Lordſhip of his anſwer, and forwardneſs with your Lordſhip; and I ſhall ſhew your Lordſhip farther at meeting, when and where your Lordſhip ſhall think it meeteſt. Till which time, and ever, I commit your Lordſhip to the protection of Almighty God. 1600

From *Gunn's Green*, the 29th day of July 1600.

P. S. Prays your Lordſhip hold me excuſed for my unſeemly letter, which is not ſo well written as miſter were; for I durſt not let any writers ken of it, but took two ſundry idle days to

do

1600 do it myself. I will never forget the good sport that Mr *Alexander*, your Lordship's brother, told me of a nobleman of *Padua*. It comes so oft to my memory; and, indeed, it is aparastur * to this purpose we have in hand.

Your Lordship's own sworn and bunden man, to obey and serve with effold and ever ready service, to his utter power, to his life's end.

RESTALRIG.

LETTER V.

Right Honourable, my hearty duty remembered, ye know I told you at our last meeting in the *Canongate*, that Mr *Alexander*, my Lord of *Gowrie*'s brother, had spoken with me anent the matter of our conclusion; and, for my own part, I shall not be hindmost. And, sinsyne, I got a letter from his Lordship's self for that same purpose; and, upon the receipt thereof, understanding his Lordship's frankness and forwardness in it, God knows if my heart was not lifted ten stages. I posted this same bearer to his Lordship, to whom you may concredit all your heart in that as well as I: For, and it were my very soul, I durst make him messenger thereof, I have such experience of his truth in many other things. He is a silly old glied carle, but wonder honest; and, as he has reported to me his Lordship's own answer, I think all matters shall be concluded at my house of *Fastcastle*; for I and Mr *Alexander Ruthven* concluded, that ye should come with him and his Lordship, and only another man with you, being but only four in company, intill one of the great fishing-

* Apropos.

fiſhing-boats, be ſea, to my houſe, where ye ſhall land als ſafely as on *Leith* ſhore, and the houſe, againſt your Lordſhip's coming, to be quiet; and, when you are about half a mile from ſhore, as it were paſſing by the houſe, to gar ſet forth a waff*. But, for God's ſake, let neither any knowledge come to my Lord, my brother's ears, nor yet to Mr *W. R.* my Lord's old pedagogue; for my brother is kittle† to ſhoe behind, and dare not enterpriſe for fear; and the other will diſſwade us from our purpoſe with reaſons of religion, which I can never abide. I think there is none of a noble heart, or carries a ſtomach worth a penny, but they would be content, and glad to ſee an contented revenge of *Greyſteil*'s death; and the ſooner the better his Lordſhip be quick; and bid Mr *Alexander* remember on the ſport he told me of *Padua:* For I think with myſelf that the cogitation on that ſhould ſtimulate your Lordſhip. And, for God's cauſe, uſe all your courſes *cum diſcretione.* Fail not, Sir, to ſend back again this letter, for Mr *Alexander* learned me that faſhion, that I may ſee it deſtroyed myſelf. So, till your coming, ever commits you heartily to Chriſt's holy protection ‡. 1600

From *Gunn's Green*, the laſt day of July 1600.

If theſe letters are genuine, the controverſy reſpecting Gowry's conſpiracy is ended. I ſhall now ſtate the proof of their authenticity. On the ſubſtance of theſe letters, or what is called *the internal evidence*, I ſhall make few remarks.

There are certain paſſages in theſe letters which expreſs ſuch a ſtrength, and originality of feature, as indicate the author to have been a character ſtrongly marked; and give reaſon to be-

* Cauſe hang out a flag. † Tickliſh. ‡ The ſubſcription is torn away from the laſt letter.

1600 lieve that the person who composed them was not writing under a fictitious signature. In one of them Logan observes, 'your 'Lordship desires in your letter that I crave my Lord, my bro- 'ther's mind, anent this matter; I utterly dissasent from that, 'that he should ever be an counsellor thereto, *for in good faith 'he will never help his friend, nor hurt his foe.*' In another, he adds, 'for God's sake let neither any knowledge come to 'my Lord, my brother's ears, nor yet to Mr W. R. my Lords 'old Pedagogue; for my brother is kittle * to shoe behind, 'and dare not enterprise for fear; the other will disswade us 'from our purpose, with reasons of religion which I can never 'abide.' The following passage in letter 1st, in my opinion, confirms its originality: 'When ye have read, send this back a- 'gain with the bearer, that I may see it burn't myself.' This precaution, which it was extremely natural for a person to sug- gest, who was writing on so dangerous a subject, yet which might in the issue be neglected, would have been the most ab- surd paragraph that could be invented by one who was fabrica- ting letters applicable to a period long previous to that on which they were to be produced.

To come, then, to the extrinsic or positive evidence of these letters, it must be remembered, that a testimony of a very singu- lar nature and force has already been produced, and that *Sprott who gave it sealed it with his blood.* The following proof is also given of the authenticity of these letters.—Mr Alexander Watson, minister of Coldingham, deposed, That on his conscience, he believed the five letters produced, to be written by the late Robert Logan of Restalrig, with his own hand, not only because

* Ticklish, in allusion to a horse that kicks and winces while he is shoed.

because the character resembled perfectly his hand-write every 1600 way, but also agreed with the fashion of spelling, which the deponent remembered in sundry specialties which he stated in his evidence. And, in confirmation of this, he produced three letters holograph of Restalrig, to show their conformity with the letters produced.

Mr Alexander Smith minister of Chirnside, deposed, That he was well acquainted with the late Logan of Restalrig, and also with his hand-write, having been preceptor to his children for many years. He swore that he firmly believed these five letters, and every word of them, to be the proper hand-write of the Laird of Restalrig, both on account of the resemblance of character, and of the peculiarity of Restalrig's spelling, which was different from the mode commonly used, in many particulars, as specified at length by the preceding witness.

Sir John Arnot *, Provost of Edinburgh, deposed, that he was well acquainted with Restalrig's hand of write, having seen many of his writings, and received various letters from him. He deposed, that, having considered the five letters produced by the Lord Advocate, he, on his conscience, believed the whole of them to be written by Restalrig, because the character agreed every way with the shape of Restalrig's hand-write, and also the spelling in many particulars, in which Restalrig differed from other mens form of writing. And, in confirmation of this, he produced four deeds, all of the proper hand-write of Restalrig, agree-

 ing

* Sir John Arnot was appointed treasurer-depute of Scotland about the year 1604. The General Register still shows the great estate he possessed in the counties of Edinburgh, Fife, Berwick, and Orkney.

1600 ing perfectly in ſpelling and character with the miſſives produced.

The ſheriff-clerk of Berwickſhire, the miniſter at Aytoun, and two other witneſſes, confirm the preceding evidence.

A ſentence ſimilar to that paſſed upon Gowry was pronounced upon Reſtalrig; a ſentence, in *one* reſpect, as illegal as it was ſevere; for the treaſon-laws only admitted of trial after death againſt the heirs of ſuch perſons as were known in their liftime to have committed treaſon, as Dr Robertſon * excellently argues. The ſtatute, however, was *not violated in any other particular;* for the ſummons againſt Reſtalrig's heirs was executed *within three years* after his death. Such, however, was then the ſtate of the country, that, in a capital trial, no man could build his ſecurity on the precepts of law, the principles of juſtice, and the feelings of humanity.

I diſmiſs this inveſtigation with ſubmitting the following propoſition: 'Whether, if the evidence I have preſented of the 'ſtate of parties in Scotland, and of their outrageous attempts; 'of what paſſed before ſuch a multitude of witneſſes at St John-'ſton on the important day; of Sprott's foreknowledge of the 'conſpiracy, which he teſtified and *ſealed with his blood*; and 'of the authenticity of Logan's letters; I ſay, if theſe united teſ-'timonies collected into one focus do not aſcertain the reality of 'Gowry's conſpiracy, I ſubmit, whether there be ſuch a thing 'as hiſtorical or legal evidence.'

Francis

* Robertſon's Hiſt. of Scotland, vol. 2. p. 260.

Francis Tennent, Merchant-Burgeſs of Edinburgh, for Writing a Seditious Paſquinade againſt the King.

THE priſoner was indicted at the inſtance of Thomas Hamilton *, his Majeſty's Advocate, for writing and diſperſing ſlanderous letters, reproachful of the King, his progenitors, and council. 1600

No counſel appeared for the priſoner; but he gave in defences in writing †, which muſt have been drawn by a lawyer. His defences were:—That he was not apprehended nor proſecuted on account of a recent crime, but for a fact alledged to have been committed three years before: That he was not allowed the legal *induciae*, or warning of fifteen days, provided by ſtatute for priſoners to prepare their defences: That no copy of the indictment was given him; but that he was *ſummarily preſented in pannell without any citation preceding:* That '*ſpeaking generally,* '*without curſing, is no lawful cauſe for taking a man's life,*' according to the liberal and humane reſcript of the Roman Emperors, *Si quis Imperatori maledixerit* ‡. 'Quoniam ſi id ex levitate proceſſerit, contemnendum eſt: Si ex inſania, miſeratione 'digniſſimum: Si ab injuria, remittendum.'

The Lord Advocate anſwered, That the priſoner's pleas of the diſtance of time at which the offence was committed, of his being furniſhed with no copy of the indictment, and being denied the

* Afterwards Earl of Hadington, and Secretary of State.

† Records of Juſticiary, October 8. 1600.

‡ Codicis lib. 9. tit. 7. l. unic.

1600 the usual time for preparing his defences, ought to be repelled, because the crime libelled was *sedition against the Prince:* That the defence which he founded on the Imperial Code ought also to be repelled by reason of the statute, James VI. parl. 14. c. 205. A statute, in which it must be confessed, that King James exceeded the tyranny of his predecessors, as it extended the pain of death to those who even read, or heard, any slanderous writings or speeches against the King, without lodging informations against the offenders.—The court repelled the prisoner's defences, and found the libel relevant.

The Lord Advocate produced before the Court, and the Jury, which consisted of merchants and tradesmen of Edinburgh, two letters. These the prisoner acknowledged to be of his handwriting; and the Jury, in respect of the act of parliament cited above, and of the letters produced, unanimously found the prisoner guilty.

It may, perhaps, appear surprising that the prisoner should have confessed; but, I apprehend it was both the most natural and most prudent conduct he could pursue: For it is probable the letters could have been proved against him; and he was threatened with the torture in the course of the process.

A royal warrant, dated at Linlithgow, September 23. was then produced, ordaining the Court to pronounce the following sentence: That the prisoner be taken to the cross of Edinburgh, and his tongue cut out at the root; that a paper be fixed on his brow, denoting him to be the author of *wild and seditious pasquils* *, and that he then be taken to a gallows, and hanged till he be dead. But,

* Pasquinades.

But, as the King affected the vain boast of clemency, a second royal warrant was produced, in which the torturing and cutting out the tongue were dispensed with; and his Majesty was *graciously pleased* to declare, he was content that the prisoner should —*only be hanged:* A sentence which was accordingly pronounced. 1600

Immediately upon the prisoner's being sentenced, the Lord Advocate took away the letters upon which he was convicted, declaring, that he would not have them entered upon the record.

Archibald Cornwall Town-officer in Edinburgh, for attempting to hang up the King's Picture on the Gallows.

As this trial is a nonpareil, I present it neat. 'Archibald Cornwall town-officer, *dilaited** of the ignominiously 'dishonouring and defaming of his Majesty, in taking off his 'portrait, and laying of the same, and setting thereof to the 'stoops and upbearers of the gibbet, pressing to fix up the same 'thereupon.'

'Pursuer Mr Thomas Hamilton † advocate to our Soveraigne 'Lord.'

Then follow the names of the assize; they are mostly taylors; two of them are designed *Fruitmen*.

'The

* *i. e.* accused.

† Rec. of Just. 25th April 1601.

1600 'The affize, by plurality of voices, choofe John Ranken (tay-
' lor burgefs of Edinburgh) chancellor.

'The affize, *for the moft part, file and convict* Archibald Cornwall, officer, of the *treafonable* fetting of his Majefty's portrait to the ftoops of the gibbet, and putting of the fame to be hung forth upon an nail infixt in the faid gibbet.

'The juftice-depute, by the mouth of Robert Galbraith dempfter * of the faid Court, decerned and ordained the faid Archibald Cornwall to forfeit life, lands, and goods, and to be taken to the faid gibbet, whereupon he *preffed* to hang his Majefty's portrait, and there to be hanged *quhill* † he be dead, and to hang thereupon by the fpace of twenty-four hours, with an paper on his forehead, containing that vile crime committed by him, which was pronounced for doom!'——A man hanged for attempting to fix up a paultry daubing, or a halfpenny print upon the gallows, or even a halfpenny itfelf; for it alfo bears 'the image and fuperfcription of Caefar.' *Dii boni!*

But this, bad as it is, is not the worft point of light in which this trial muft be viewed. For to hang a man on account of tranfgreffing a law, annexing a capital punifhment to the knotting of ftraws, is not fo repugnant to liberty and juftice, as the hanging him upon no law at all, but merely at the caprice of a tyrant. Now, there is nothing in the Scottifh ftatutes upon which this indictment could have been founded. The idea, indeed, muft have been borrowed from the Roman law; yet, even upon the Imperial edicts, this man could not have been legally convicted:

* Executioner, from the word doom; or perhaps from the Latin verb *demo, dempfi.*

† until.

convicted: For there is hardly an analogy between the images of the Roman Emperors and a modern picture; Emperors, who themselves were deified, and whose consecrated statues were the objects of religious adoration. Nay, were the analogy complete between the Imperial images, and the pictures of a modern prince; and, were the sanguinary edicts that guarded the majesty of Rome, suitable to a limited monarchy, still the prisoner must, by law, have been acquitted; for 'Non videri contra majestatem fieri ob imagines* Caesaris *nondum consecratas venditas*.' 1603

Doom pronounced over the Dead Body of Francis Mowbray, a prisoner, who was killed in his attempt to escape from Edinburgh Castle.

A Royal warrant was directed to Sir William Hart, and the other Judges of the Court of Justiciary, setting forth, in the usual bombast stile of treasonable indictments, that the deceased had been † guilty of *most high, horrible, and detestable points of treason*: That the same was verified by *two or three* witnesses; but that the deceased obstinately persisted to deny the charge: That he attempted to make his escape from Edinburgh Castle, which rendered his guilt the more manifest; and that, in the attempt, he had brought about his own miserable and shameful death. The warrant, therefore, required the Court to pronounce sentence on the deceased 'Francis Mowbray, *now* '*presented on pannel*' (*i. e.* produced at the bar) to be dismembered as a traitor; his body to be hanged on a gibbet, and afterwards quartered; his head and limbs stuck up on conspicuous places in

 the

* Digest. Lib. 48. Tit. 4. Lex 5. § 2.

† Rec. of Just. ult. Jan. 1603.

1603 the city of Edinburgh; and his whole eſtate to be forfeited. The warrant is dated at Holyroodhouſe, 31ſt January 1603, and is ſubſcribed James Rex, Montroſe Cancellar, Marr, Herreis, Halyrudhouſe. Doom was pronounced accordingly.

This, perhaps, exceeds every act of King James's tyranny. For, *1ſt*, this ſentence of forfeiture, pronounced after death, was not adjudged by Parliament, but by the Court of Juſticiary, in conſequence of a royal edict. *2d*, No ſummons of treaſon was executed againſt the heirs of the deceaſed, nor any defender cited, unleſs the corpſe, which was produced at the bar, can be called a defender. *3d*, No ſpecific charge was exhibited againſt the deceaſed; nor any thing but a general accuſation of treaſon and *laeſe-Majeſty*, which, in thoſe days, was ſo far from conveying any preciſe and definite idea, that it might have been any thing which occurred to the whim of the King's Advocate, or that of his Royal Maſter. *4th*, No proof was adduced in Court, no jury called, nor verdict returned, eſtabliſhing the charge upon which the ſentence of forfeiture was pronounced.

Nothing can impreſs us with a worſe opinion of thoſe times, than to behold the people ſtupid, yet whimſical, abject, yet inſolent. When arouſed by the clergy, on the ſcore of ſpeculative doctrines, or even forms of religion, they would break forth into the wildeſt outrages againſt their governours; yet they would remain ſupinely indifferent to the wanton invaſion of the moſt eſtabliſhed principles of law, and of the moſt ſacred rights of mankind.

Trial

Trial of Mr Andrew Crichton for Declining the Authority of the King and Privy Council.

THE prisoner, who was brother to the Laird of Innernytie, was prosecuted at the instance of Sir Thomas Hamilton, his Majesty's Advocate, for *treasonably* * declining the jurisdiction of the King and Privy Council. The indictment set forth, that the prisoner being brought before the Privy Council, 'to be examined upon such matters concerning his Majesty and the estates of this his kingdom, and required by their Lordships to give your oath to them, that you should faithfully and truly answer to them, and declare the verity of such things as should be demanded of you: Ye treasonably refused to acknowledge his Majesty, and the saids Lords of his most honourable Privy Council, to be your judges; but most treasonably declined their judgment.' 1610

The act of Parliament, A. D. 1584, c. 129. confirming the authority of the King and Privy Council, in all cases, and over all persons, and annexing the pain of treason to the denial of the same, was then read over to the prisoner: But he persisted in declining the jurisdiction of the King and Privy Council, and judicially ratified his *declinature*.

The Court sentenced him to be taken to the Cross of Edinburgh, and to be hanged, his body to be dismembered as a traitor, and his whole estate to be forfeited. But, after remaining six

* Rec. of Just. 29th August 1610.

1610 ſix months in priſon, under ſentence * of death, the King was pleaſed to change the ſentence to perpetual baniſhment.

In reading the judicial proceeding of thoſe wretched times, our ſurpriſe is divided between the muliſh conceit of indviduals in declining the royal authority, and the tyranny of government in the exerciſe of that authority. This mode of calling people before the Privy Council, and requiring them to make oath that they ſhould anſwer every queſtion which might be put to them, is as high a ſtretch of tyranny, as any tribunal on earth, I preſume ever attained. That no rude breath might pollute the Majeſty of the Throne, a capital puniſhment had been annexed, even to the hearing of ſlanderous ſpeeches againſt the King, without informing upon the authors; and the unſocial † ſpirit of the reformed religion had guarded its *monopoly of the mind*, by annexing the like penalty to thoſe who gave food or lodging to a Popiſh prieſt. To call then people before the Council, and oblige them to give an oath that they ſhould anſwer every queſtion which might be put to them, was laying them under the neceſſity of becoming public informers, in a caſe where the pain of death was annexed to the exerciſe of an act perhaps of hoſpitality or charity.

I preſume it muſt have been ſome motive of religion which induced the priſoner, Crichton, to decline the authority of the King and Privy Council. So nearly do extremes meet ‡, that Black,

* Rec. of Juſt. 27th February 1611.

† It is ſtrange that *the true religion*, which is the only *direct* road to ſalvation, will not content itſelf with the endleſs ſpiritual conſequences it preſents to mankind, but that it will alſo deal out fire and faggot, to thoſe who are ſo far miſtaken, as to purſue their courſe to heaven by any other road.

‡ Spottiſwood's Hiſt. p. 419. See the trial of Ogilvie *infra*.

Black, the Presbyterian minister at St Andrews, declined their authority in the year 1596, when cited before the Privy Council to answer for an offence which he had committed; and Ogilvie the Jesuit declined the same jurisdiction, A. D. 1615, when required to answer every interrogatory that might be put to him. Black received a censure, but Ogilvie was hanged. 1615

John Fleming for Slanderous Speeches against the King.

THE prisoner was pursued at the instance of Sir William Oliphant of Newton, King's Advocate, on account of 'treasonable, blasphemous, and damnable speeches, uttered by 'him to John Lauder minister at Cockburnspath.' The prisoner most humbly threw himself in his Majesty's will, *i. e.* * submitted to his Majesty's pleasure.

The indictment set forth, that this Lauder, the minister, 'having reprehended and found fault with the said John Fleming, 'because his son repaired not to the communion; saying to the 'said John, that *albeit* (although) he contemned the order and 'discipline of the Kirk, yet the King's most gracious Majesty, 'who is a most religious and Godly Prince, and *under whose 'blessed government the true religion* and discipline of the Kirk 'is established, and advanced, would not suffer such contempt 'and disobedience to pass unpunished! The said John Fleming, 'upon deliverance of the said speeches, shaking off all fear of 'God, and that reverend respect which in conscience before

'God,

* Records of Justiciary, May 17. 1615.

1615 'God, and in his duty and allegiance he owed to his Majesty, 'most treasonably, blasphemously, and *mischantlie* *, replied to 'the said minister in these words: Feind † nor the King shoot 'to dead or the morn, and that he die of the falling sickness.— 'And it being demanded of the said John, what moved him to 'utter such blasphemous and horrible speeches against his Ma- 'jesty? made this scornful and disdainful answer, Were not ‡ 'the King and his laws, he had not wanted his lands; and 'therefore he cared not for the King, *for hanging would be the* '*worst of it.*'

The prisoner was not far mistaken in his prediction. He was sentenced to be hanged at the cross of Edinburgh, and his moveable goods to be forfeited.

Thomas Rois ‖; *son of the late John Rois of Craigie, for writing and publishing at Oxford, a Pasquinade against the Scots.*

1618 THE prisoner was prosecuted before Mr Alexander Colville Justice-depute, at the instance of Sir William Oliphant of Newton, his Majesty's Advocate, who produced in Court an act of Privy Council, authorising the prosecution.

The

* From an obsolete French word, *meschantment*, wickedly, maliciously. † An oath, a mode of swearing. ‡ The cause of offence which this poor man had received was the loss of a law-suit. ‖ I know not if the family of *Rois*, or *Ross*, of Craigie, be still extant; but their armorial bearings are described by Sir James Balfour, Lyon King at Arms in the reign of Charles I.; Nisbet's Heraldry, vol. 1. p. 416.

1618

The prisoner was charged in the indictment with 'the devilish and detestable firing, feigning, *blasphemous* uttering, and 'by writ publicly exposing, of an villainous *, infamous, and 'devilish writ,' &c. In this pasquinade, which was in the form of a thesis, the prisoner had maintained, that all Scotsmen, except the King, his sons, and a very few others, ought to be debarred from the Court of England. He expressed his surprise, that the English, who in other respects were quick enough sighted, should suffer such an unprofitable and pernicious multitude, the very offscourings of the people, to domineer within their territories. He laid down his thesis in ten propositions, or articles, composed in Latin, and written with his own hand. He affixed it to the door of St Mary's church, in Oxford, and publicly offered to defend his thesis, at the Universities of Paris, Cambridge, or Oxford. From all these seditious and inflammatory articles, the indictment concluded, that the prisoner had acted a most unnatural part towards his own countrymen, had endeavoured to stir up the English to murder them, and had transgressed sundry acts of Parliament, viz. James I. Parliament 2. act 43.; James II. Black acts †, act 100.; James VI. Parliament 8. act 134.; Parliament 10. act 10.; Parliament 14. act 205.

However criminal the prisoner might be in exciting jealousies and dissentions between the English and Scots, it was truly absurd to charge him with having transgressed these statutes; for they related to the sowing dissention between the King and his people; and they were enacted before the union of the Crowns, at a time when the former of these nations was described in the statute-

* Records of Justiciary, August 20. September 10. 1618. † *i. e.* printed in Saxon character.

1618 ſtatute-book, as '*our ancient enemies of England.*' Not only was the priſoner innocent of tranſgreſſing theſe ſtatutes, but the Court of Juſticiary had ſurely no juriſdiction over him, in an offence which conſiſted in having publiſhed a 'deteſtable, fireing, *blaſphemous* theſis,' at the Univerſity of Oxford.—In thoſe times, however, it was ſufficient, if ſome attention was paid to the forms, without the ſmalleſt regard to the principles of law and juſtice. King James knew, that, even armed with the terrors of the Star-chamber, he could not, in England, overwhelm the priſoner with that deſtruction which he meditated; he therefore embraced the illegal reſolution of ſending the priſoner to be tried in his own country; a country where the tranſient gleams of fanaticiſm ſerved only to caſt a gloomy light athwart the region of tyranny and ſlavery.

The indictment being read over, the priſoner judicially confeſſed his guilt, but declared, at the ſame time, that he committed this offence, while he was in a ſtate of inſanity. He craved pardon of God, the King, and his countrymen, and *came in the King's will*, *i. e.* ſubmitted to his Majeſty's pleaſure. He expreſſed his hope, that his Majeſty, being a gracious Prince, would incline to *mercy*, *which is God's right hand*, *rather than to juſtice*, *which is but his left*. And he entreated the Court to intercede in his behalf.

Being found guilty by the jury, the Court ordained him to be taken back to priſon, and to be kept in irons till the King ſhould be informed of his conviction, and till he ſhould ſuffer an exemplary puniſhment.—The Court met again on the 10th of September, when a warrant from his Majeſty, directed to Lord Binning, Secretary of State, was produced, conform to which, ſentence was pronounced on the priſoner, that he be taken to the

the crofs of Edinburgh, and his right hand ftruck off; and there- 1618
after his head to be ftruck from his body, his hand to be put upon the Weft Port, and his head on the Netherbow.

James Skene for Treafonable Opinions and Declarations.

THE prifoner, who was brother to the Laird of Skene, was 1680
profecuted at the inftance of his Majefty's Advocate * for high treafon. He was charged in the indictment with being acceffory to the rebellion headed by Balfour of Kinloch, and Hackfton of Rathillet, at Air's Mofs and Bothwellbridge; with having maintained the lawfulnefs of that rebellion, even in prefence of the Duke of York, and of the Lords of Privy Council, and thofe of Jufticiary; with having juftified the excommunication of the King, and having maintained it was lawful to kill him, &c.

The proof adduced againft the prifoner was his own confeffion, emitted before the Duke of York and Privy Council on the 13th November 1680, of which the tenor follows:

He faid, he did not know who were rebels, but denied that he was prefent at the battles of Bothwellbridge and of Air's Mofs. He thought the perfons engaged in thofe infurrections were not rebels, for they were in defence of God's caufe. He was not at the Torwood conventicle when the King was excommunicated, nor did he know who contrived it, but he thought the reafons of the excommunication juft. He acknowledged the burning the

* Records of Jufticiary, November 22. 1680.

1680 Acts of Parliament, because they were *against the Covenant;* and would not admit the authority of the King or Parliament in things that were against the Covenant. He did not know if any new insurrection was plotted; *but he believed that God's people were always ready to take arms in defence of themselves and of the gospel; that he was one of God's people, and had resolved to give an testimony for the cause.*—He thought the killing of the Archbishop of St Andrews was not murder: That there is a declared war between those who serve the Lord, and those who serve the King against the Covenant; and that it is lawful to kill such in defence of the gospel: *That the King being excommunicated, and there being now a lawful declared war against him on account of the breach of the Covenant, it is lawful to kill him, and all those who are in opposition to the Covenant.*

He renewed his confession before the Court and Jury. He was desired to deliberate before he should sign it: He answered, he had resolved to sign it; he thought it his honour to do so; and he did it accordingly.

The Jury unanimously found the prisoner '*guilty* of the treasonable crimes and expressions mentioned in his dittay, and that by his own confession.' The Court sentenced him to be taken to the Cross of Edinburgh on the 24th of November instant, to be hanged on a gibbet till he be dead, his head to be separated from his body, and fixed on the Netherbow, and his whole estate, real and personal, to be forfeited.

Charles

Charles Lord Fraser * *for High Treason, in proclaiming the late King James to be Righteous and Lawful Sovereign of this Realm, &c.*

IT was charged against the prisoner, that, contrary to his allegiance, he, in the month of June or July 1692, went with his accomplices to the market-cross of Fraserburgh, stepped upon the cross, and, after three † several *O yes's*, did three several times proclaim the late King James, and the pretended Prince of Wales, to be righteous and lawful King of this kingdom, and successor to the same, and that they cursed all who would say the contrary: Then they drank, and caused to be drank, King James's good health, and that of the Prince of Wales, and cursed King William and all his adherents; drank to his confusion; uttered reproachful speeches of him, calling him *Burgar*, and Burgar-Master of the Hague, and saying that he was only Prince of Orange: That, for the greater solemnity, they fired guns and pistols from the Cross on the occasion, and forced some of his Majesty's subjects to drink treasonable healths: By all which the prisoner testified his rebellion against his Majesty's person and authority, and his treasonable intentions to depose the King; and did disown the King's title to the crown, and did all that in him lay to incite the people to take arms: For which contempts and treasons he ought to be punished with death, and the forfeiture of his estate. 1693

K 2 After

* This family was raised to the peerage by Charles I. A. D. 1633. The title became extinct by the prisoner's dying without issue; Douglass's Peerage, page 273. † Records of Justiciary, March 29. 1693.

1693 After a prolix argument, the Court found the indictment relevant to infer the pains libelled.

The following persons composed the assize: Lord Forrester, Lord Bargeny, the Master of Forbess, James Oswald of Singletoun, James Baird of Saughtonhall, Patrick Murray of Livingstone, Mr George Scot of Giblestone, William Dick of Grange, Sir Alexander Gilmour of Craigmillar, James Eleis of Southsyde, Sir Robert Milne of Binnie, Hugh Wallace of Inglistoun, Alexander Nisbet of Craigintinnie, William Biggar of Woolmet, and Sir Wiliam Binning of Wallyfoord.

THE PROOF.

Thomas Pyper, weaver, saw Lord Fraser come from the house of John Hay vintner, and go to the Cross, and step upon it: He heard one in the company cry three O yes's, and proclaim the late King James and the Prince of Wales, and this was after some person had bid him proclaim, '*to whom he answered, what* '*shall I proclaim, my Lord?*' After these proclamations, the witness heard King James's name mentioned, saw the people on the cross have drink with them, and heard the shooting of pistols. Adds, that Lord Fraser was on the Cross at the same time with the man who proclaimed King James.

John Wood saw Lord Fraser and others go to the Cross, saw his Lordship on the Cross, heard a servant belonging to the company cry three several O yes's, and then proclaim the late King James and the Prince of Wales; and after the proclamation he heard two shots of a pistol. The witness carried wine to the company at the Cross.

Henry

Henry Finlayſon ſaw Lord Fraſer and others on the Croſs drinking healths; their ſervants told him it was the late King James, and Prince of Wales's health: Lord Fraſer and another gentleman held drawn ſwords to the deponent's breaſt, and forced him to drink ſome healths. 1693

John Hay, vintner, depoſed, that Lord Fraſer went out of his houſe to the Croſs, and the deponent went there alſo, and heard his Lordſhip drink King James's and the Prince of Wales's health. He heard alſo the firing of piſtols.

Alexander Robertſon heard a noiſe at the Croſs, opened his window, and ſaw and heard a perſon cloathed in red cry three O yes's, and proclaim King James *as our righteous King*. The deponent, at the ſame time, ſaw the priſoner on the Croſs, and heard the company drinking healths. He did not diſtinctly hear whoſe health, but heards the words, '*Burgar*, *the Hague*, *and* '*Orange*,' come from the company.

James Hardie, ſervant to John Hay vintner, ſaw Lord Fraſer, and ſeveral others, go to the Croſs, and the witneſs was employed to hold ſome of their horſes. He heard and ſaw a footman make three O Yes's off the Croſs, and begin a health to King James and the Prince of Wales, 'and bid *the ill man* * take all 'that refuſed to pledge it.' He ſaw the priſoner, and others, drink the health, and heard ſome ſhots of a piſtol.

James Scot ſaw Lord Fraſer, and others, at the Croſs; he ſaw and heard them drink King James's, and the Prince of Wales's healths, and heard Lord Fraſer curſe thoſe preſent who refuſed the toaſt. He heard four ſhots.

The

* A fanatical term for the Devil.

1693 The Lord Advocate protested for an assize of willfull error, if the jury should acquit the prisoner. The prisoner protested in the contrary; because the Committee of Estates which declared King James to have *forfaulted* the Crown, and bestowed the same on William and Mary, solemnly enacted and declared, '*That* '*assizes of error** *are a grievance.*'

Seven Peers and eight gentlemen of distinction who were summoned to be upon the jury, were fined a hundred merks each, for not obeying the citation. The jury, of which Lord Bargeny was Chancellor, all in one voice found it not proved that the prisoner either actually proclaimed, or caused proclaim, the late King James, and the pretended Prince of Wales; but found it proved that he was present at the proclamation. Found, by a plurality of voices, that a proclamation was made at the Cross of Fraserburgh, of the late King James and the Prince of Wales; *but not in terms of the indictment, viz. as being righteous and lawful King of this kingdom, and lawful successor therein.* The assize, all in one voice, found it not proved, that the prisoner and his accomplices cursed all those who would say to the contrary. They found it proved, that the prisoner drank King James's † health, and that of the Prince of Wales: But found his cursing King William, and drinking to his confusion, and uttering reproachful

* Act of Estates, No. 18. April 13th 1689.

† In the reign of George I. Alexander Crawfurd was fined L. 50 Sterling, for drinking the health of King James VIII. and to his happy restoration. Rec. of Just. 21st Feb. 1715. And a Highland minister was turned out of his meeting-house for three years, for not praying for King George by name, but for the '*Supreme in authority who sits upon* '*the royal throne*;' and this at a time when there was no statute for praying for the King by name, except that which ordained the clergy to pray for *Queen Ann, and the Princess Sophia*: Nor any law for it, but a proclamation of the Lords of the Regency. Rec. of Just. 11th, 14th, 18th, 19th, 25th July 1715.

proachful ſpeeches of him, and forcing people to drink treaſonable healths, not proved. They found that piſtols were fired; but did not find that it was by the priſoner's order.—The Maſter of Forbeſs, the Lairds of Craigmillar, Livingſtone, and Southſyde, deſired it to be marked in the record, that they found the proclamation proved in terms of the libel. On the 16th of May the Court pronounced ſentence on Lord Fraſer, fining him in L. 200 Sterling. 1693

Captain Simon Fraſer of Beaufort, and many other perſons moſtly of the Clan Fraſer, for High Treaſon, in forming unlawful aſſociations, collecting an armed force, occupying and fortifying houſes and garriſons, impriſoning and raviſhing perſons of diſtinguiſhed rank, and continuing in arms after being charged by a Herald to lay them down.*

THIS is the only caſe I know of ſince the revolution in which a perſon was tried in abſence before the Court of Juſticiary; a proof led, a jury incloſed, a verdict returned, and ſentence pronounced, forfeiting life and eſtate, honours, fame and poſterity. The firſt inſtance of this tyrannical mode of proceeding was the illegal ſentence upon the Rebel Covenanters after the battle of Pentland, which was afterwards reſcinded by act of Parliament. The Rebels of Bothwellbridge met with the ſame treatment; and the like was repeated after the defeat of Monmouth. 1698

The following is one of the moſt ſingular proſecutions in our criminal record: Whether we reſpect the ſtretch of law that was made

* The celebrated Simon Lord Lovat.

1698 made to convict the absentee, or the savageness of his conduct, or the absolute dominion that he possessed over his followers, and directed to purposes the most shocking to human nature.

By the law of Scotland, outlawry, even for treason, inferred the forfeiture only of personal estate. It was sanctioned by statute, that trials for treason could not be taken in absence; but that the whole accusation *, argument, and evidence, should be led in presence of the accused, and no otherwise. So anxiously did the professional lawyers adhere to this form, that, as our jurisprudence admitted, under certain limitations, of trial after death †, for this heinous offence, on such occasions, the bones of the deceased were dug out of the grave and formally presented in Court.

When the Covenanters were defeated in the battle of Pentland, a desire to arm insulted majesty with additional terrors, or to enrich the servants of the Crown with unlawful spoil, induced the Ministers of Charles to attempt, in absence of the accused, the trial of those rebels, and the forfeiture of their estates. And, although the complaisant disposition of Parliament gave every reason to conclude that they would not have hesitated to pass a law to this effect; yet it suited better the views of a tyrannical administration to operate this innovation in law, by the decree of Judges who were appointed, and might be removed at pleasure, than by the authority of the Great Council of the Nation.

Before

* Bankton's Inst. vol. 2. p. 251.; Erskine's Fol. Inst. p. 733.; James VI. Parl. 11th, c. 90.; Mackenzie's Crim. Tit. Treason, § 22. 23.

† See trial of the Earl of Gowry, p. 20. of Logan of Restalrig, p. 46.

* Before the Court of Justiciary proceeded to such an important innovation, so little idea *was then entertained* of its supremacy and infallibility †, that the Court of Session was consulted upon the occasion. After tampering with the Judges, a memorial and queries were laid before them by Sir John Nisbet, King's Advocate, and Lord Bellenden Treasurer-depute, stating a variety of arguments, by inference and analogy, to show, that, if the Parliament could proceed to forfeit after death, why not the Court of Justiciary; and, if either could try after death, why not also in absence, since 'what is just before Parliament, is just 'and warrantable before other judicatories.' Upon this and the like notable arguments, the Lords of Session delivered an opinion, declaring, that, upon sufficient proof being taken before the judges and assize, they might proceed in absence to sentence, and to forfeit persons guilty of high treason. Thus fortified, his Majesty's Advocate prosecuted, in absence, Colonel Wallace, William Muir of Caldwell, and some other gentlemen; and a verdict being found against them by the jury, the Court sentenced them to be put to death as traitors, when they should be apprehended, and their whole estates, real and personal ‡, to be forfeited. From a consciousness of the illegality of the sentence, it was solemnly ratified in Parliament; trial in absence was adopted as a part of our law; and, in consequence, two of the most distinguished personages in the nation, the Duke of Monmouth, and 1698

* Mackenzie's Criminals, p. 30. Wodrow's History of the sufferings of the Church, vol. 1. p. 267.; Appendix, No. 14. 15. 16. 18. vol. 2. p. 115. 586.; Charles II. Parliament 2. c. 11. † It is now alledged, that no appeal lies from the Court of Justiciary to the House of Lords; and a judgment, indeed, to that effect, has been pronounced. As no man can command his faith or his judgment, I have never been able to discover *either the legality or propriety of this decree.* ‡ Muir of Caldwell's estate was gifted to General Dalziell, commander of the forces at the battle of Pentland.

1698 Fletcher of Saltoun, were condemned and forfeited, the former *when dead*, the latter, when out of the kingdom.

Had the torrent which overwhelmed the lineal ſucceſſion of our Sovereigns iſſued pure from the fountain of liberty, and in its wide and rapid courſe been contaminated by no foul ſtream, *trial in abſence* would have been enumerated in the liſt of thoſe illegal and grievous aſſumptions of power upon which the eſtates of Scotland declared King James to have forfeited his right to the crown. And the opinion of the Lords of Seſſion on this head, as well as on the two other caſes ſtated in '*the Claim of Right*,' would have been declared to be contrary to law. But it was deemed prudent to preſerve this ſtatute as a ſecurity for the good behaviour of the numerous exiles who followed their Prince to the court of St Germains. A law was accordingly paſſed *, reſcinding the act 1669. c. 11. in ſo far as it ratified the forfeiture of the Covenanters; but not repealing the act itſelf, which might now be turned as an engine of oppreſſion upon the party which contrived it. It muſt be acknowledged, however, that King William's miniſters made no rigorous exerciſe of this law. The Earls of Melfort, Middleton, and Lauderdale, and *ninety gentlemen* †, were ſummoned before the Court of Juſticiary, in one day, to ſtand trial for various points of treaſon; in particular, for entering into the French ſervice when that ſtate was at war with his Majeſty, and for riſing in arms againſt the King. They failed to appear, and ſentence of outlawry only was pronounced againſt them.

Tyrannical

* William and Mary, Parl. 1. Seſ. 2. c. 31. The moſt approved commentator on the Scottiſh law, has ſo far miſunderſtood this act, as to ſay, that the act *1669* was repealed by it. Erſkine's Fol. Inſt. p. 733.

† Rec. of Juſt. 23d July *1694*.

Tyrannical as this ſtatute was, Captain Fraſer could not have been convicted upon it but by an obvious wreſting of the law; for it authoriſed trial in abſence, only in 'caſes of treaſonable riſing 'in arms, and open and manifeſt rebellion.' Now, it is altogether abſurd, to conſtrue the collecting of an armed force for the purpoſe of *private rapine* *, into *treaſonable riſing in arms, and open and manifeſt rebellion.* 1698

It will be proper to ſtate the motives which induced Captain Fraſer to perpetrate the barbarity and villainy which gave occaſion to this trial. On the death of Hugh, tenth Lord Lovat, the titles and eſtate of Lovat were diſputed between his Lordſhip's daughter, heir of line, and Thomas Fraſer of Beaufort, the Captain's father, heir-male. The Captain wiſely propoſed to do away the conteſt, by uniting their perſons and pretenſions, and there was not a diſparity of years to render ſuch marriage anyways abſurd. With this view, he privately paid his addreſſes to the young lady, and one Fraſer of Tenecheil was made the confident of the amour. The Captain obtained her conſent, and ſhe actually eloped from her mother's houſe of Caſtle Downie, under the conduct of the mutual confident; but the perſon whoſe fineſſe was employed to accompliſh the intrigue, from whatever motive of fear or of venality, of caprice or of remorſe, blaſted it at the moment, when it was ſure of ſucceſs. He forced the lady to return to her mother, to whom he diſcloſed the intrigue.

It was no longer thought ſafe for the Lady to remain at Caſtle Downie, as this ſeat was in the domains of the clan Fraſer, over whom the Captain poſſeſſed great influence. She was therefore

* Records of Juſticiary, 27th June, 12th July, 5th and 6th September, 1698.

1698 conducted under a proper escorte to Dunkeld, a house of her uncle's, the Marquis of Athole, and this Lord prevailed on his niece to accept as a husband *the Master of* Salton. The intended bridegroom set out for Dunkeld to celebrate the espousals, accompanied by Lord Mungo Murray. As the Captain foresaw in this match the ruin of his hopes, he embraced the resolution of preventing the marriage by force; and (if he could not possess himself of the heiress) of compelling a marriage with the *Dowager*, who, in virtue of her jointure, was in possession of a considerable part of the estate of Lovat: And this wild enterprise was to be accomplished by such deeds, that the stern contrivance of the principal actor is less shocking than the abject submission of his accomplices.

The substance of the indictment against Captain Fraser was, That he and his associates came to a house belonging to Mr Fraser of Strichen, and there entered into an unlawful bond of association for the prosecution of certain wicked designs: That they raised a body of four or five hundred men in arms, in order to support Captain Fraser's pretensions to the estate of Lovat: That they seized the persons of Lord Salton and Lord Mungo Murray, and made them close prisoners for six or seven days in the house of Finallen; erected gallowses before their windows, and afterwards carried them by force to islands and mountains, and treated them very harshly: That Captain Fraser and his associates marched in form of war to the house of Castle Downie, the seat of Lady Dowager Lovat, garrisoned the house, plundered the effects, and put armed guards upon the different apartments, and attempted to compel her Ladyship to agree to certain deeds which they endeavoured to extort from her; but she remaining resolute, the Captain all of a sudden took up the

mad

mad and villainous resolution of forcing her to marry him: 1698
That, accordingly, one of his associates, Mr Robert Monro minister of Abertarfe, pronounced the marriage ceremony: That the Captain, by the aid of his associates, did commit rape and forcible abduction upon the person of Lady Lovat, attended with circumstances of excessive barbarity: And that they continued in arms, after having been charged by a herald to lay down their arms; set the Lady at liberty, and surrender themselves prisoners.

His Majesty's Advocate represented to the Court, that by an act of Parliament of King James VI. summonses at his Majesty's instance, 'against * islandmen, highlandmen, or borderers, '*ubi non patet tutus accessus*, be made at the mercat cross of the 'head burghs of the next shires in the Lowlands:' That Captain Fraser and his followers continued in arms and open rebellion, and therefore craved their Lordships to grant warrant for an *edictal citation* being executed against the defenders, which was accordingly granted.

On the 5th of September, his Majesty's Advocate proceeded in the trial, declaring that he insisted for *forfaulture* in absence against Captain Fraser, and nineteen other gentlemen specially named; and that he restricted the libel against the defenders to treasonable rising in arms, and open rebellion, with all the aggravations charged in the indictment. The Court found the indictment thus restricted, and thus presented, relevant to infer the pains of treason.

THE

* James VI. Parliament 11th, act 66.

THE PROOF.

1698 Alexander Fraſer, younger of Balnain, depoſed, That at the time ſpecified in the indictment, he ſaw a paper ſubſcribed by ſome of the accuſed, and delivered to Lord Fraſer, of the tenor of the bond of aſſociation now read in court. He was at Finallen when Lord Salton and Lord Mungo * Murray were brought priſoners, and were there committed to cloſe cuſtody, and gallowſes erected before the windows of the apartments where theſe Lords were confined. He ſaw then at Finallen, about two or three hundred men in arms, under the command of Captain Fraſer, and different parties of armed men were ſent to and fro, between the houſes of Finallen and Caſtle Downie. He was alſo at the latter of theſe houſes, where he ſaw Lady Lovat and alſo Captain Fraſer, and a number of armed men ſtanding ſentry in the houſe, and even on the threſhold of my Lady's apartment. He went to my Lady's chamber door, whom he heard ſighing; but the bagpipes were playing in the next room; this was about day-break, and my Lady's women were in another room weeping, and ſentinels ſtanding over them.

Thomas Fraſer of Gartlobeg, in September preceding, ſaw Captain Fraſer, &c. &c. to the amount of about ſixty or ſeventy men in arms, horſe and foot; the Captain thanked them for aſſembling ſo readily, and deſired them to be ready at a call. In October, Captain Fraſer and the deponent coming from Inverneſs, met in the wood of Bonchreive Lord Salton and Lord Mungo

* Son to John 1ſt Marquis of Athole, by Lady Amelia Stanley, daughter of James Earl of Derby, and brother to the Lady Dowager Lovat, mentioned in this trial.

Mungo Murray, who were returning from Castle Downie. The Captain gave orders to his followers to seize Lord Salton *dead or alive;* went close up to them with cocked pistols, and commanded them to yield themselves prisoners. Lord Salton asked, For what cause? to which the Captain replied, '*because it* '*was his pleasure.*' These Lords were dismounted from their own horses, disarmed, put upon mean ponies, surrounded by guards, with their muskets levelled, and durks drawn, and thus conducted to the house of Finallen, where they were kept prisoners for several nights, in separate apartments, under a strict guard. The deponent *saw the Fiery Cross* *, *and heard the Coronoch* sent through the country; upon which between three and four hundred armed men assembled at Finallen under command of Captain Fraser, who detached a party to the house of Castle Downie, 1698

* This mode, by which the Highland chieftains convoked their clans to arms, is, I apprehend, of greater antiquity than their conversion to Christianity; with the difference only of change of *symbol*. Anciently, when the chief desired to assemble his clan, he killed a goat with his own sword, and dipped a half burned stick in the blood. This he gave to one of his vassals, who bore it with all despatch to the next village, where the first person he met was obliged, by the feudal customs, to relieve him, and carry forward this summons to arms; and thus it was carried from village to village through the chieftain's domains.—Upon their conversion to Christianity, the Priests would no doubt discover in the killing of a goat a species of heathen sacrifice. It was proper that a symbol should be adopted more analogous to their new religion; and what so suitable as the cross, which, under the splendid name of the *Labarum*, blazed in the heavens, conducting *the* Christian Emperor to victory and glory. A slight pole, with a bit of stick infixed in the figure of a cross, burned at the ends, was substituted in the place of that dipped in goats blood: And this ceremony was performed even in the late rebellion.—There were two sorts of *coronoch;* that properly so called was the dirge which accompanied the deceased to their grave; the other, which is here alluded to, was a sort of war song, or dismal howl, which the women set up on seeing the *fiery cross*, from the anxiety they entertained about the safety of their husbands and friends in the approaching hour of battle.

1698 Downie, where ſentinels were put upon the rooms, particularly my Lady's chamber, for ſeven or eight days.—He heard the Captain '*demanding oaths of fidelity of ſuch of the gentlemen of* '*his name as he ſuſpected; and ſuch as he did not ſuſpect he only* '*took their promiſes; and ſome of them did ſwear, and ſome pro-* '*miſe*.'

Robert Spence ſaw Lord Salton and Lord Mungo Murray carried priſoners by Captain Fraſer to the houſe of Finallen, where they were confined about a week in ſeparate apartments, and ſentinels put over them. Lord Salton and Lord Mungo Murray were then carried to Caſtle Downie; and the force commanded by Captain Fraſer, at this time, conſiſted of about five hundred armed men, marching with two pair of colours. The men were ſworn upon their durks to be faithful to the Captain, and never to deſert him. They kept Lady Lovat priſoner for ſome time at Caſtle Downie, and afterwards carried her along with them. When the Captain heard that Lord James Murray, with ſome gentlemen, and *a party of redcoats*, were coming to reſcue my Lady, he again ſent the fiery croſs to ſummon the country to riſe in his defence; and he continued in arms till about Chriſtmas.

John Monro, late footman to Captain Fraſer, ſaw the Captain, and the whole other perſons now inſiſted againſt (for forfaulture), and about three hundred more, with colours diſplayed, and pipes playing, under the Captain's command, at Finallen, the night Lord Salton and Lord Mungo Murray were made priſoners. He ſaw the men *drawn round the colours, and ſworn upon them, and upon the points of their durks*, to adhere to the Captain. He heard the coronoch the night Lady Lovat was carried from Caſtle Downie. About Martinmas the herald left his charge againſt the Captain,

Captain, &c. '*in a cloven ſtick at the river ſide, oppoſite to the* 1698 '*Iſle of Eagies;*' and, after that, the Captain and others continued for ſome time in arms.

Amelia Reoch, late ſervant to Lady Lovat, depoſed, that Captain Fraſer, with a party of armed men, came to Caſtle Downie. He put ſentinels with drawn ſwords upon and within Lady Lovat's chamber, made her three waiting maids be carried by force out of the room, and detained priſoners. About two in the morning, two armed men carried the deponent back to my Lady's apartment, whom ſhe found ſitting on the floor, her hair diſhevelled, her head reclining backwards on the bed, Donald Beaton pulling off my Lady's ſhoes, and the Captain holding burned feathers and aquavitae to her noſe, her Ladyſhip being in a ſwoon. They commanded the deponent to take off my Lady's clothes; but ſhe ſpurned at the deponent with her feet, ſhewing the greateſt reluctance; upon which, Fraſer of Kinmonavie held up my Lady in his arms; the Captain pulled down her petticoats, and ſought a knife from Hugh Monro to cut off her ſtays; but, he having none, the Captain ordered Kinmonavie to cut them off with his durk, which was done accordingly. The deponent was put out of the room; and, when ſhe was going 'over the cloſe *,' ſhe heard 'my Lady's cries, although the bagpipes were playing all the 'time in the room next to her Ladyſhip's.' In the morning, when the deponent returned, ſhe ſaw my Lady's head hanging over the bed-ſtock, her face ſwoln, and her Ladyſhip to all appearance out of her judgment; ſhe ſpoke none, but gave the deponent a broad ſtare; even ſome days after, ſhe did not know her own brother, Lord Mungo Murray; and, when Dumballoch's Lady came into the room, and called Lady Lovat 'Madam,' ſhe anſwered, 'call me not Madam, but the moſt miſerable wretch 'alive.'

M Janet

* The Court-Yard.

1698 Janet Fraser deposed, that Lady Lovat's waiting maids were forcibly turned out of her room by Captain Fraser, about twelve o'clock at night. My Lady clung by the deponent, and, when she was torn from her Ladyship, fell on her face on the floor. Next morning, when the deponent saw my Lady, her head was hanging over the bed, and she was out of her judgment, mistaking the deponent for Lady Catharine Murray, Lady Lovat's sister, who had been dead several years.

Christian Maclean deposed, That, on the night of the '*sham-*' '*marriage*,' she was in the next room to Lady Lovat, and, notwithstanding the bag-pipes were blowing all the while, she heard my Lady crying and sobbing, and praying, 'Lord have mercy 'on her soul.'

The jury returned a verdict finding the indictment proved; and the court adjudged Captain Fraser, and the other persons against whom the verdict was found, to be executed as traitors, at such time, place, and manner, as their Lordships should appoint, to undergo the punishment ordained by law for traitors, 'their name, fame, memory, and honours to be extinct, and 'their arms to be riven furth and deleted out of the books of 'arms; so that their posterity may never have place, nor be able 'hereafter to bruik or enjoy any honours, offices, titles, or dig'nities,' and to have *forfaulted* all their lands, heritages, and possessions whatever *.

This sentence, which was severer even than that commonly pronounced on traitors, seems to be copied from the sentence pronounced

* Captain Fraser was also prosecuted before the Court of Justiciary for a rape by the party injured, Lady Dowager Lovat, and was outlawed for not appearing to stand trial. Rec. of Just. 17th Feb. 1701.

pronounced by Parliament, after death, on Logan of Restalrig and the Earl of Gowry. As Captain Fraser, in the rebellion 1715, although supposed to be a keen Jacobite, supported the House of Hanover, King George I. granted him a pardon and remission of this sentence *: And he claimed and obtained the contested title and estate of Lovat. He joined the next rebellion against the family that pardoned and restored him; and his house of Castle Downie, which had witnessed his foul crimes, was burned by the royal army before his eyes, and those of three hundred of his clan, a few days after the battle of Culloden.—How he lost his titles, and estate, and his life also, is known to every one; so perhaps he is the only person upon record who was twice condemned, twice forfeited, and whose estate was twice restored. 1698

Mr John Thomson and Charles Auchmouty, servants to the African Company, for Treason and Leasing-making, by designing and causing to be engraved a Political Print.

THIS trial, with the facts which gave rise to it, presents us with a remarkable picture of liberty and fortitude in Parliament, of expiring struggles for tyranny in the Sovereign, and of the final victory of secret influence over parliamentary independence. 1701

 In

* Paper Register of Chancery, B. 16. No. 134. Remissio et rehabilitatio Simonis Fraser de Beaufort, Domini Lovat, de crimine perduellionis aliisque infrascript. St James's, 10th March 1716.

1701 In the year 1695, an Indian and African Company was established in Scotland. L. 400,000 Sterling were subscribed by such proprietors as were natives and residenters. The Company fitted out six ships of force and burthen *, laden with various commodities, which sailed from the Forth. They planted, by the name of *Caledonia*, a colony on the Isthmus of Darien; and, from the establishment of this Company, and its colony, the nation universally flattered itself with the eager and unbounded prospect of extended trade and empire. From the jealousy the English, Dutch, and Spaniards, entertained of this colony, it may be presumed that the prospects which this nation derived from it, were at least plausible.

But, besides the opposition of rival powers, *Caledonia* experienced that of her Sovereign, whose political views, or personal attachments, led him to embrace the hostile spirit of his other dominions. The colony was attacked, was abandoned; the vessels were captured, the adventurers were killed in battle, were executed as pirates, or died of famine; and the company was ruined. When the fatal tidings were received at Edinburgh, the sense of injury and disappointment was so strong as to burst forth with a fury which threatened immediate rebellion; and the great officers of state had to retire for a time to screen themselves from popular resentment.

When the Parliament met, the first symptom of their displeasure, at the enemies of the African Company, was to pass an order for burning, by the hands of the hangman, a pamphlet, entitled, 'A Defence of the Scots abdicating Darien,' and requiring

* Act of Scottish Parl. 26th June 1695.; Lockhart's Mem. p. 29.; De Foe's Hist. of Union.; Scott's Hist. p. 710.; Edinburgh Gazette, No. 8. No. 36.

ring the Lords of the Treasury to pay a reward of L. 6000 Scots* 1701
to any person who would apprehend William Herreis, the alledged author, and bring him before a magistrate. Soon after, they passed a resolution, declaring, that the votes and address of the Parliament of England in December 1695, and the address of the House of Lords in February last, *were undue intermeddlings* † *in the affairs of this kingdom, and an invasion of the sovereignty and independence of our King and Parliament.* They next resolved, 'That the memorial presented in his Majesty's 'name, as King of Great Britain, to the Senate of Hamburgh, 7th 'April 1697, by Sir Paul Rycaut, then resident in that city, and 'Mr Grosset, his Majesty's Envoy Extraordinary at the court of 'Lunenburgh, *was most unwarrantable, containing manifest false- 'hoods, and contrary to the law of nations, injurious to his Majesty, 'an open encroachment* upon the sovereignty of this Crown and 'kingdom, the occasion of great losses and disappointments to 'the said Company, and of most dangerous consequence to the 'trade of this nation.' Moved, 'That, whoever advised his 'Majesty's answer to the address of the Parliament of England a- 'gainst our Indian and African Company, are enemies to this 'kingdom,

* L. 500 Sterling. Rec. of Scottish Parl. 16th Nov. 1700. 9th, 10th, 13th, 14th, 15th, 17th, Jan. 1701.

† The *intermeddlings* complained of were, that both Houses of Parliament had addressed the King, representing, That the act to which he had given the royal assent in Scotland, for erecting a Company trading to Africa and the Indies, granting them an exemption from public burdens for twenty-one years, would make Scotland a free port for *East-India commodities*, enable her to undersell England at foreign markets, and be of great prejudice to the trade and revenue of the latter kingdom; especially when Scotland shall have settled plantations in America. The King returned the following answer: '*I have been ill ser- 'ved in Scotland; but I hope some remedies may be found to prevent the inconveniencies 'which may arise from this act.*' Journal of House of Lords, 13th December 1695, 8th February 1699. House of Commons, 14th, 18th December 1695.

1701 'kingdom, and, if ſubjects thereof, are traitors to their King 'and country, and be proſecuted accordingly.' After a debate, the motion was withdrawn.

They alſo reſolved, that the proclamations iſſued by the Engliſh plantations againſt the African Company, particularly that againſt furniſhing any proviſions or neceſſaries whatever to their colony, directly or indirectly, and even debarring them wood, water, and anchorage, were injurious to the Company, barbarous to the adventurers, contrary to the law of nations, and a great occaſion of the loſs of the colony. Reſolved, that this colony was a legal and rightful ſettlement holding of the Crown of Scotland; and *moved*, that the conduct of the Spaniards to the ſaid colony was an open hoſtility againſt the Crown of Britain, and that ſatisfaction ought to be demanded. All the reſolutions were paſſed *nemine contradicente*, and the motion was delayed.

Theſe formidable reſolutions, however, by the dexterity of William's miniſters, vaniſhed in ſmoke; for the Court party moved an *addreſs* to the King on the reſolution, aſſerting the company's right to the colony; while the country party contended, that, in the preſent circumſtances, *an act of parliament* was requiſite for ſecuring the company's rights, as well as for regulating the conduct of the perſons engaged in the proſecution of them. A debate and diviſion on this queſtion taking place, it carried for an *addreſs* by a hundred and eight againſt eighty-four *. And the whole of the minority entered a formal diſſent.

This

* The Peers and Commons of Scotland formed but one houſe. Thoſe who

This addreſs recapitulates the grievances of the African Company, and the reſolutions of parliament mentioned above, omitting entirely however that for demanding ſatisfaction of the Spaniards; it concludes with praying his Majeſty's protection and countenance againſt the violence of Spaniards, and of Engliſh miniſters abroad. 1701

It was the parliamentary diviſion upon this addreſs, which was the ſubject of the political print that gave occaſion to this trial.

The print repreſented Scotland in the figure of a woman wearing a crown, having the name of *Scotia* over her head, and ſupported by the *eighty-four diſſentient members*. Theſe were entitled, '*Caledonia's ſupporters*.' They were diſtinguiſhed with the following motto, encircled with wreaths of laurel, '*patriae fautoribus*;' and the woman addreſſed them * in theſe words: '*Take courage, and act as men that hold their liberty, as well as their glory, dear.*' Below, an angel ſpoke thus to a multitude of little figures which he was driving with thunderbolts to hell, '*Procul, o procul eſto profani.*' (Theſe figures were charged in the indictment as repreſenting the majority in parliament.) And, in

who voted for an *addreſs*, were,		Thoſe who voted for an *act of parliament*,	
Peers	41	were, Peers	20
Commiſſioners for Barons, *i.e.* Knights of the ſhire.	32	Knights of the ſhire,	43
Commiſſioners for boroughs.	35	Repreſentatives of boroughs,	21
	108		84

It is perhaps ſuperfluous in me to add, that all the officers of ſtate were in this liſt.

* Rec. of Juſt. 14th, 21ſt, April; 23d, 24th, May, 1701.

1701 in the midſt of the flames, lay a perſon who was tormented by a fiend, that addreſſed him in theſe words: '*Vendidit hic auro* '*patriam.*'

His Majeſty's Advocate produced before the Court of Juſticiary an act of the Privy Council, authoriſing him to proſecute the priſoners on account of this engraving, '*for ſuch crimes, and* '*upon ſuch laws, as his Lordſhip ſhall think fit to libel.*'

Thus authoriſed, his Lordſhip muſtered up againſt the priſoners *ſeven pages folio of indictment*, charging them with the breach of ſundry acts of parliament * againſt *leaſing-makers*, and thoſe who preſume 'publicly to declaim, or privately to ſpeak or write 'any purpoſe of reproach or ſlander of his Majeſty's perſon, 'eſtate, or government, or to deprave his laws, or miſconſtrue 'his proceedings, whereby any diſlike may be moved betwixt 'his Highneſs and his nobility and loving ſubjects, in time coming, *under the pain of death.*' Alſo, charging the priſoners as tranſgreſſing the acts againſt thoſe who diſpute the authority of the Eſtates of Parliament; and, likewiſe, as tranſgreſſing the ſtatutes againſt thoſe who conſpire to levy war againſt the King. *Nevertheleſs*, (the indictment concludes), the priſoners, by deſigning the ſaid print, are guilty of the ſaid crimes.—A deſcription of the print, and an application of it to the laws, then follow. Turgidity of ſtile, and ſtrained conceit, are ſubſtituted in the vacant places of law and reaſon. And the concluſion of the libel, which is *worthy* of the premiſſes, is, that theſe crimes being found proved, the priſoners are thereby guilty of *leaſing-making and treaſon, and ſubject to the pain of death.*

The

* The acts libelled againſt the priſoner were, James I. parl. 2. c. 43.; James V. parl. 6. c. 83.; James VI. parl. 8. c. 130. & 134. and parl. 10. c. 10.; Charles II. parl. 1. ſeſſ. 2. c. 2.

The priſoners were heard by counſel, and *informations* * were lodged on either ſide. The information for his Majeſty's Advocate is one of the moſt prolix and inconcluſive pieces of compoſition that I recollect in judicial procedure. The information for the priſoners maintains, 1*mo*, That the ſtatutes againſt *leaſing-making*, &c. are obſolete, and are ſpecially declared to be ſo in the *Claim of Rights*, as being in the number of thoſe upon which the Earl of Argyle was convicted. 2*do*, That, to extend criminal laws, and capital puniſhments, by parity of reaſoning;—to infer leaſing-making, and ſedition, and treaſon, from a hieroglyphic, a print, eſpecially the print libelled on, is contrary to thoſe general principles of law which have been eſtabliſhed by the wiſdom of the learned, as requiſite for the ſecurity of the governed.—In oppoſition to theſe, it was maintained by his Majeſty's Advocate, that, although the forfeiting the Earl of Argyle upon *ſtretches* of obſolete laws, was declared contrary to law, it did not thence follow that thoſe againſt leaſing-making were obſolete, becauſe the Earl was indicted upon acts not founded on againſt the priſoners; and it was not declared in the Claim of Rights, that *all the acts* upon which the Earl was indicted were obſolete. 2*do*, With regard to the print, it was argued, if the intention of leaſing-making and miſconſtruing was plainly diſcernible in it, this 'ſubtle manner of conveying the poiſon doth render 'it rather more wicked and dangerous than the moſt direct and 'blunt calumny.'—The other parts of theſe voluminous informations require no notice. 1701

The Lords pronounced the following interlocutor: Find the indictment, and qualifications thereof, do not infer the crime of treaſon,

* So law papers, in Scotland, which contain a ſtate of the fact and argument, are ſometimes called.

1701 treafon, or the pain of death, but fuftain the fame *relevant to infer an arbitrary punifhment.*

THE PROOF.

Alexander Kennedy of Glenure depofed, that the prifoner, Thomfon, came to his houfe one evening, in company with the other prifoner, Auchmouty, and brought with him the copper-plate now produced in court, defiring the deponent to caft off impreffions of it, which he refufed, unlefs a warrant from authority was produced, as he fufpected it might relate to affairs of ftate. Next day, he obferved the prifoner, Auchmouty, go up to his printing-houfe; and the deponent following him, faw the copper-plate in the prefs, and one of his fervants cafting off copies. He fnatched up one of them, and carried it ftraight to the Lord Advocate. One of the macers * of council then came to the deponent's houfe, and required him to bring the copper-plate, and all the copies, before the Lords of Privy Council, then met, which was done accordingly; and Auchmouty was prefent when they were feized.

George Burgon, fervant to the preceding witnefs, depofed, that the two prifoners, and Robert Wood engraver, brought the faid copper-plate to him, and came once and again requefting the deponent to caft off impreffions of it, which he as often refufed till they fhould obtain his mafter's order. At length, his miftrefs fent for him, and the two prifoners were then with her, and fhe defired him to caft off the impreffions required, and now produced in court, which he did accordingly. The prifoners at this time engaged to ftand between him and all hazard that he might incur

* Mace-bearers.

condition under which alone the attainder was to take place, viz. the prisoner's not surrendering himself before a day certain, never existed, for the prisoner did actually surrender himself to a justice of peace within the time prescribed by the act. They argued, it was not necessary to prove that the justice of peace had taken the oaths, or officiated in that capacity, for these are not mentioned as requisites in the statute: That the prisoner had fairly submitted to justice; and Sir Alexander M'Donald, to whom he surrendered himself, was a gentleman of known affection to his Majesty's government, who at that very time was at the head of a considerable body of militia employed in his Majesty's service: That his not being committed to jail did not affect the validity of the surrender; for, even supposing it to have been Sir Alexander's duty to have committed him, it was absurd, that, by reason of Sir Alexander's ignorance, or neglect of duty imposed on him by the statute, the prisoner should incur the pains of treason: That the prisoner must be held as having been under the protection of government, not only from his surrender to a justice of peace, but likewise from his having received a pass from the Earl of Albemarle, commander of his Majesty's forces, by virtue of which he remained unmolested; but, in the month of August 1746, he and his father, then in the country of Moidart, out of private pique, were seized by certain of the Clan Cameron, put on board a vessel, carried to France, and there kept in close custody for a twelvemonth: On their escape from France, and return to Scotland, both father and son were apprehended by a party of his Majesty's forces; the father died in confinement; but the prisoner, upon a just representation of these facts, was immediately set at liberty, and remained peaceably and openly at Inverie till July last: That, as to no testimony of the surrender being admissible but written record, no such requisite was prescribed by the statute; and it were strange if *parole* evidence

1754

could

1754 could only be received in ſupport of the priſoner's guilt, and not in vindication of his innocence.—*Laſtly*, That trial by jury was the grand bulwark of our lives and liberties; and if, in any caſe, this mode is more ſpecially requiſite, it is in accuſations of a direct offence committed againſt the crown.—Anciently, attainders in abſence were unknown, both in England and Scotland; but now, that the wiſdom of the law had thought proper to introduce ſuch attainders, various defences might yet be ſtated againſt awarding execution, eſpecially where the attainder is not abſolute, but conditional.—By act 7th of Queen Ann, c. 21. the Scots treaſon-laws are totally aboliſhed; and it is therein provided, that the court of Juſticiary, in caſes of Treaſon, ſhall proceed and determine in ſuch manner as the Court of King's Bench may do by the laws of England: Therefore, as it is not diſputed that every defence, againſt awarding execution, propoſed by the priſoner, before the Court of King's Bench, muſt be tried by jury, the like rule muſt be obſerved in the Court of Juſticiary. This is made ſtill clearer by act 22d George II. c. 48. which provides, that all defendants outlawed for high treaſon, or miſpriſion of high treaſon, in Scotland, ſhall, *as near as can be, have ſuch and the like methods, remedies, or advantages, for avoiding, falſifying, or reverſing, ſuch outlawry as may be had by the law and uſage of England.*

The Lords found the act of attainder ſufficiently inſtructed by the Statute-book, and examplification of the act produced in court, and repelled the objections to its authenticity. They alſo repelled the objection of a miſnomer of Macdonald for Macdonnell.—With reſpect to the defence of a ſurrender, they ordained the priſoner to give in a more ſpecial *condeſcendence* * of the time, place,

* A ſtate of facts.

place, and manner, of his submitting himself to justice; also, a list of the witnesses by whom he was to prove the same; and found '*no necessity of proceeding in this matter by a jury.*' 1754.

Conform to this judgment, the prisoner gave in a *condescendence* of facts relative to his surrender, as already stated, and a long list of witnesses by whom it was to be proved; and the crown lawyers disputed the relevancy of the *condescendence*, by repeating, at great length, the objections to the surrender which they had already set forth.—The Court having considered the import of the *condescendence*, and heard the debates, found the prisoner's plea of surrender, as therein set forth, not relevant, nor sufficiently qualified in terms of the act of attainder, *repelled the defence founded upon it, and refused the prisoner any proof of the fact.*

An objection was then moved by the prisoner's counsel to the whole witnesses cited for the prosecutor, as the executions of summons against them had been returned to the clerk of court only that morning. It was answered by the crown lawyers, that the witnesses summoned upon a more early citation had absconded; it therefore became necessary to call this additional list. —The Court repelled the objection; but adjourned the trial till Friday next, that the prisoner might have opportunity to see the list, and propose any legal objections to the witnesses adduced.

The prisoner being again brought to the bar on the 22d of March, gave in a declaration to the Court equivalent to an acknowledgment of his identity. The prosecutor, however, thought proper to lead a proof by witnesses of his identity. This being done, the Court pronounced judgment upon the prisoner, find-

 ing,

1754 ing, 'That the said Archibald Macdonald is the same person 'who stands attainted of High Treason by the act of parliament 'above mentioned, by the name and designation of Archibald 'Macdonald, son of Coll Macdonald of Barisdale; and, therefore, 'and in respect thereof,' adjudging the prisoner to be taken to the Grass-market of Edinburgh, on the 22d of May next, and hanged on a gibbet, to be cut down alive, his entrails torn out and burnt, his head cut off *, his body quartered, and his head and quarters to be at the King's disposal.

This

* A petition of appeal to the House of Lords, against this sentence, was drawn; but, while the prisoner's friends were adjusting some difficulty about the mode of presenting it, the necessity of a petition was superseded by a reprieve, and afterwards by a pardon. Since that, various petitions of appeal have been presented, particularly in the cases of Ogilvie 1765, Mungo Campbell 1770, Miller and Murdison 1773; and, *lastly*, in the case of Bywater, A. D. 1781. And a solemn judgment of the House of Lords was pronounced, finding, that *no appeal lies from the Court of Justiciary to their Lordships.*—The most mature consideration of this important subject that I am capable to bestow,—the laborious search that I have made into our criminal records from A. D. 1536 to the present times, have completely rivetted my opinion, that this judgment requires again to be considered,—that law and expediency both require it.—While I am reluctantly obliged to deliver my sentiments, it affords me considerable satisfaction, that I am laid under no necessity of canvassing the arguments delivered on this topic before their Lordships, by the truly venerable Peer who presides in the Court of King's Bench.—I have not to combat that noble Lord's opinion, but the report sent from this country to his Lordship, upon which, I apprehend, his opinion was founded.—I did intend to publish an argument to show, '*That an Appeal lies from the Court of Justiciary to the House of Lords;*' but, as I am at this minute doubtful if I shall be able to accomplish my original purpose, of presenting my argument in the form of an Appendix to this work, I trouble the reader with this note, expressive of my zealous wish, that if, upon a future occasion, a prisoner shall be advised of a sentence pronounced by the Court of Justiciary, affecting his life or liberty, being *contrary to law;* I say, that the prisoner implore relief from the House of Lords, by petition of appeal, craving their Lordships once more to admit this question to a solemn discussion;

This sentence, and the interlocutors preceding, appear contrary to law in three respects, as they refuse to sustain the prisoner's defence of a surrender, and to allow a proof of the same; as they only find that the prisoner was the identical person pointed out in the act of attainder, but do not also find that he did not surrender himself in terms of the act; and as they refuse to admit the prisoner to trial by jury. 1754

The judgments are illegal, as they refuse to sustain the prisoner's defence of a surrender.

Penal laws are, in general, prohibitory regulations designed for the order and security of civil society, discharging the people at large from certain actions, such as theft, murder, and the like. In the case of actual or meditated rebellion, a conditional act of attainder is provided for the security of the state, by ordaining, that suspected individuals pointed out in the act, shall perform certain conditions therein prescribed. In the *first* of these, the law is *general*, and the crime consists in *perpetrating things prohibited*. In the *second*, the law is *special*, and the offence consists in *omitting things commanded*. If one of the public is brought to trial for transgressing the former of these laws, it is the most valid of all defences, that *he did not commit the deed prohibited*. If an individual pointed out in the latter of these laws is accused of not having done what was therein required, it is an equally valid defence, that *he did perform the condition prescribed*.—Therefore, to doom a man to the scaffold

discussion; and to appoint a *complete and accurate report* to be laid before their Lordships, of the cases which have been brought from the Court of Justiciary, before the Scottish Privy Council, *his Majesty, and the Estates of Parliament of Scotland*, and the British House of Lords, from A. D. 1641 to the present times.

1754 on the former of theſe laws, who had not committed any theft, murder, or the like, is not more to *condemn without guilt*, than to conſign to puniſhment, on the latter of theſe laws, one, who had abſolved himſelf from the imputation of guilt, by ſurrendering his perſon, or performing the other conditions required.

The ſentence is illegal, or inefficacious, and null; as it only finds, that the priſoner was the identical perſon pointed out in the act of attainder, but does not alſo find that he did not ſurrender himſelf in terms of the act.

The perſons whoſe names were engroſſed in the act of attainder could incur the *declared preſumption* of guilt, could become criminal, and amenable to puniſhment, only *by not performing* the conditions of the act. Therefore, the Court, in finding an undoubted, indeed notorious truth, that the priſoner was the perſon deſcribed in the act, and ſentencing him to death on that account; without alſo finding that he did not ſurrender in terms of the ſtatute, did condemn him to death without any ſtatutory guilt upon the part of the priſoner, or any ſtatutory authority upon the part of the Court. This may be further elucidated by obſerving, that, by changing the words, ‘ Archibald Macdonald,’ into ‘ Alexander Earl of Kelly,’ the like judgment might with truth have been pronounced, viz. that his Lordſhip was the perſon deſcribed in the act of attainder, and the like ſentence of death been therefore paſſed upon that Lord, although he did publicly ſurrender himſelf to government, and conſequently was never challenged on account of the act.

The ſentence is illegal, becauſe the priſoner was denied the benefit of trial by jury.

It

It has already been observed, that penal laws are for the most part *general and prohibitory;* but that, in the case of conditional acts of attainder, they are *special and mandatory*. If, then, the mode of trial by jury is the established law of a country, as that to which the life of a citizen can most safely be trusted; the same reason holds for adopting this mode, whether the prisoner be accused of *committing* what was *prohibited* by a general law, or *omitting* what was *required* by an act of attainder. Further, had the prisoner been brought to trial in England, he would, beyond dispute, have been entitled to have had his defences tried by jury: But, by statutes of Queen Ann, and of King George II. the treason laws of England are extended to this country, and the same mode of trial (as near as may be) is prescribed; consequently, the prisoner was equally entitled to trial by jury, when brought before the Court of Justiciary, as if he had been brought before the Court of King's Bench. 1754

But it is by no means surprising, that the Court of Justiciary should have pronounced this judgment, refusing the prisoner a trial by jury, when we reflect upon the disposition which our Courts of law have manifested to encroach upon, to annihilate this invaluable privilege. It appears, that, by the old law of Scotland, trial by jury took place in matters both civil and criminal. Our civil judges have long since exalted their own dominion, by shaking themselves loose of the intervention of a jury; and I confess, in questions merely of property, I do not wish to see this mode of trial restored: For, so tedious are our forms of proceeding, that it would be impossible to decide matters of property by a jury, without effecting so great an innovation in our system of jurisprudence, as must be productive of inconveniencies and perplexities which could not be removed but

in

1754 in a long courſe of practice.—Nor do I think there is danger in truſting queſtions of right between man and man, to the ſole deciſion of our judges; for, beſides that redreſs may be ſued for to the Supreme Court of the nation, it can but rarely happen that partiality towards a party or a cauſe, will, in civil matters, influence any of their Lordſhips. But, in a criminal Court, when judges are actuated by a laudable zeal for the checking of enormous crimes, for bringing an obnoxious criminal to juſtice, it is leſs ſafe to truſt the life of a priſoner in the hands of judges appointed by the crown, than in thoſe of a jury choſen promiſcuouſly from the priſoner's equals. Much leſs in accuſations of treaſon or others of direct offence, by a ſubject againſt the Sovereign; for in ſuch, I apprehend, it muſt neceſſarily happen, that judges will, for the moſt part, lean towards the crown.

On a late occaſion the Lords of Juſticiary delivered a ſolemn opinion *, that, in criminal actions before inferior courts, in caſes ſhort of capital puniſhment, trial by jury is not requiſite. But,

* Records of Juſticiary; Procurator Fiſcal of the City of Edinburgh againſt Young and Weemyſs, 19th March 1783.—When this cauſe was argued before their Lordſhips, Ilay Campbell, the preſent Lord Advocate, then Solicitor General, appeared as counſel for the proſecutor. He maintained, that the leſſer treſſpaſſes, which were to be puniſhed by fine and impriſonment, might be tried without jury, but did not plead that the ſeverer puniſhments of pillory and baniſhment could be inflicted but after trial by jury. But their Lordſhips, in giving their opinions, ſaid they were not bound to regard Mr Solicitor's admiſſions. The Honourable Henry Erſkine, who was counſel for Young and Weemyſs, contended, that no corporal puniſhment whatever could take place but after trial by jury.—As the nature of this work lays me under the neceſſity of preſuming to give my own opinion, I muſt obſerve, that it coincides entirely with the plea maintained by the Solicitor General, viz. That ſuch offences as fall to be puniſhed by fine and impriſonment may be tried without jury, but that crimes *which are to involve a deeper conſequence* may not.

But, unless their Lordships shall be disposed to pay more respect to this opinion than they sometimes do to precedent, we may entertain a rational hope, that, in future practice, they will alter their judgment. Before delivering their solemn opinions, their Lordships heard counsel on this point, whether the various degrees of corporal punishment, short of death, could be inflicted, but after trial by jury; and a report was, upon their order, made to them of the practice before the inferior judicatories, as well as the supreme tribunal of Justiciary. From the report made to them, it appears, that never were a set of judges, never a set of benches, more impartial, if an uniform discrepancy, and contradiction of practice, can be stiled *impartiality*. The practice before the magistrates of royal boroughs, and that before the sheriffs, were diametrically repugnant to each other; and that of the Court of Justiciary fluctuated from the one side to the other like the ebbing and flowing of the tide. 1754

By the report made of the practice before the magistrates of royal boroughs, in the trial of crimes not capital, it appeared, that, in the whole of these boroughs, *except one*, (the borough of Ayr), the magistrates were in use to proceed without jury. The proceedings again, in the different counties, evinced, that, in all of them, *except one*, (the county of Edinburgh), the sheriffs were *not* in use to inflict any corporal punishment without the verdict of a jury, imprisonment excepted. Upon these opposite modes of procedure, I must observe, that the magistrates of royal boroughs, in this country, cannot, in general, be supposed either to have studied the science of the law, or to have enjoyed the benefit of an academical education; and that, in many of the decayed boroughs, it cannot be presumed that the magistrates are men of liberal ideas, or independent sentiment and situation in life: That the sheriffs again must be chosen from the bar. Thus, this

1754 this oppofite practice in fheriffs and magiftrates, juftifies the proverb, that the greater the ignorance, the greater the prefumption.

It appeared from an examination into the records of Jufticiary, that one Dow, and his accomplices, in the year 1739, had been tried before the juftices of peace of Linlithgow, for breaking into the brew-houfe and cellars of Mr Hope of Craigiehall, and ftealing quantities of wine, brandy, and ale: That they *confeffed their guilt*, and were fentenced by the juftices to be imprifoned, whipt, burnt on the back, and banifhed the county. Dow brought this fentence under review of the Court of Jufticiary, alledging, that fo fevere a punifhment could not be inflicted by any judge, unlefs the prifoner had been found guilty by the verdict of a jury; and the Court fufpended the fentence, except as to the whipping.

In A. D. 1747, Robert Drummond printer, was profecuted before the magiftrates of Edinburgh, for a defamatory libel againft a perfon of the higheft rank *. He admitted that the ballad libelled on was printed in his printing-houfe; but denied any knowledge that the blanks in it were meaned to be filled up with thofe names and characters which the profecutor applied to them. The magiftrates ordained the ballad to be burnt, the prifoner to ftand an hour on the pillory, and to be banifhed the city, and deprived of his freedom as a burgefs †, for a twelvemonth. Mr Drummond brought the caufe before the Court of Jufticiary

* His Royal Highnefs William Duke of Cumberland.

† The intelligent reader is requefted to think, whether the moft arbitrary judge in England, fince the acceffion of the Houfe of Hanover, would have dared to try fuch an offence without jury.

Justiciary by *bill of suspension* *. He maintained, that the prosecutor had filled up the blanks from his own conjecture, and that he the prisoner was altogether ignorant how they should be supplied: That, supposing him to be guilty, the sentence was unmeasurably harsh; and further, that, in a matter of such consequence, he was entitled to trial by jury. The Court *refused the bill without answers*. 1754

In A. D. 1757, John Falconer was tried before the sheriff of Edinburgh for using of false keys, and stealing of victual. He was ordained to be kept in prison till payment of the expences of his prosecution, which amounted to L. 1 : 10 : 0, and to be banished the county for life. He complained to the Court of Justiciary, that he had been tried without jury, and they dismissed his complaint.

Alexander Flight was prosecuted before the bailies of Cupar in June 1767, for insulting the Provost, and was sentenced to a month's imprisonment, and banishment from the town for three years: But their Lordships suspended the sentence as to the banishment.

* There are two forms of *writs* by which causes may be brought from inferior judicatories under review of the Courts of Session or Justiciary. The one is by *bill of suspension*, which may be presented after a judgment of the inferior court is passed, and the decree extracted; the other, *by bill of advocation*, which may be presented to their Lordships any time between the party being served with a summons to appear before the inferior court, and the decree of that court being extracted. Both these writs pass the signet, and are signed by a writer to the signet: And, upon their being presented to one or more of their Lordships, they either *pass or refuse the bill*.

1754 An action was brought before the sheriff of Edinburgh, by John Simpson copper-smith, against Leonardo Piscatorie, teacher of music, (A. D. 1771.) It charged the defender with firing a gun or pistol, loaded with small shot, at the prosecutor, and maiming him so severely as to render him unable, in future, to earn his bread: And it concluded for L. 500 of damages to the private prosecutor; and also, that the defender should be punished by pillory, whipping, or otherwise. Piscatorie claimed to be tried by jury; because the libel concluded for a corporal punishment. The sheriff refused his claim; upon which the defender brought the cause before the Lords of Justiciary, who pronounced the following judgment: 'Having considered the said bill, 'and answers, with the criminal complaint before the sheriff, '*find the libel referred to in the bill ought to have been tried by* '*a jury*,' &c.; and, therefore, ordained the sheriff to dismiss the libel; but reserve power to the pursuer to insist in a new indictment according to law.

The author who last travelled over the gloomy field of criminal prosecutions*, bestows a hearty and generous applause on this judgment. To me is left the unpleasing *piece of duty* to acquaint the public, that the next time this point was debated before their Lordships, they pronounced a judgment considerably different; and, soon after, they gave a solemn opinion directly opposite. For Archibald Tait overseer (*i. e.* bailiff) to the Earl of Roseberrie, being convicted, in July 1775, by the justices of peace of Linlithgow, of embezzling oats, hay, and straw, belonging to the Earl, and *under the defender's trust*; and being sentenced to be pilloried and banished the county for life, brought this judgment under review of the Lords of Justiciary. The following points were argued before their Lordships, both in pleadings at the bar, and

* Maclaurin's Criminal Cases, p. 723.

and in printed informations, 1*mo*, Whether justices of the peace had a jurisdiction to try this crime? 2*do*, Whether they could proceed in such trial without jury? And their Lordships, upon advising the cause, suspended the sentence as to the pillorying; but affirmed it in other respects. 1754.

In the case of the procurator-fiscal of Edinburgh against Young and Weemyss, when the preceding report was laid before their Lordships, the indictment concluded, 'That they ought not only 'to be punished in their persons, *by whipping*, *banishment*, *pil-* '*lory*, *imprisonment*, *or otherwise*, as to the magistrates shall seem 'meet,' &c. but ought also to be fined in the sum of L. 50 Sterling each, payable to the complainer. Among other pleas which the defenders urged, why trial could not proceed against them, upon the libel raised before the magistrates, they maintained, that no sentence of corporal punishment could be pronounced, but after verdict of a jury. The indictment was, in various respects, so illegal and absurd, that their Lordships would not sustain it: But they omitted not to express the special reasons why they ordained the magistrates to dismiss the libel. Lest an opinion should prevail, that trial by jury was necessary in prosecutions for a corporal punishment, each of their Lordships, in rotation, except Lord Gardenston, who was absent, delivered an opinion, that the lesser crimes could be tried, and the punishments of whipping, pillory, and banishment, inflicted, without trial by jury. It is not easy, however, for the mind to renounce, at once, doctrines which have long been respected, to *conquer prejudices* which have long been entertained. Of this the Court seems to afford a pregnant instance; for, on the same day, their Lordships gave judgment upon a bill of advocation from the sheriff of Edinburgh, at the instance of one Ballentine, finding that the libel or complaint 'referred to in the bill of advocation, which contains a

 'charge

1754 'charge of different acts of assaulting, wounding, and maiming, 'whereby the persons therein named were in danger of being 'murdered; and also charging, that, in pursuance of these assaults, the defenders forcibly seized, and theftuously carried off 'certain effects belonging to the persons assaulted, *and concluding for punishment, by whipping, pillory, banishment, or otherwise, as to the judge shall seem meet*, ought to have been tried 'by a jury.'

This judgment, however, in so far as it is opposite to the one immediately preceding, is, in my humble opinion, a distinction without a difference, or rather a manifest absurdity.—This will be rendered the more apparent by stating the ground of this judgment, and the gradation of our criminal punishments.

Ground of this Judgment.

The ground upon which it proceeded was, that tresspasses which are reckoned *inter leviora delicta*, may be tried without jury; but that the crimes which are reckoned *inter graviora delicta* cannot.

Gradation of our Criminal Punishments.

Imprisonment, whipping, pillory, and banishment, are almost the only corporal punishments in use with us, short of death.—These, and pecuniary mulcts, are applied both to offenders who are guilty of the *leviora*, and the *graviora delicta*, according to the discretion of the judge.

To allot an exact gradation of punishment to the scale of guilt, even with the most accurate system of legislature, is perhaps impossible,

possible,—but to expect it from that *image* of jurisprudence which has been erected in the days of tyranny; from an image to which poetical fiction would attribute a leaden head, and hands of iron, is absurd.—The tribunals of Fame, of Conscience, and of a Future State, may indeed apply a more exact dispensation of justice; but, if the punishment prescribed by law be the same, it is alike to the prisoner, as to *personal suffering*, whether he be convicted of a statutory trespass, or an atrocious crime. Therefore, in so far as personal safety is concerned, if there is to be any difference in the mode of trying crimes, the more solemn, the more guarded mode of trial, ought to be adopted, *rather in relation to the severity of punishment than to the atrocity of the crime.* —But, in these bills of advocation by Young and Weemyss from the magistrates, and by Ballentine from the sheriff, the degrees of guilt charged were different, the punishment concluded for was the same *, the judgments of the Court of Justiciary were opposite; the distinction, therefore, which is made by these two judgments amounts precisely to this—*That a man may, without jury, be pilloried and banished for a peccadillo, but cannot, without jury, be pilloried or banished for an atrocious crime.* 1754

The instances in which the court affirmed or reversed the sentences of the inferior judicatories, inflicting corporal punishment without trial by jury, have been just recapitulated: And, besides the case of Macdonald of Barrisdale, the court took upon them, in another capital offence, to decide without jury. It was in the trial of John Caldwall for robbery †. The plea of madness was urged in his defence; but, instead of remitting this plea, along with

* Except that, in the libel against Young and Weemyss, there was, besides other punishments, a conclusion for a fine of L. 50 Sterling each, which was not in the libel against Ballentine.

† Records of Justiciary, July 13. 1737.

1754 with the indictment, to the cognisance of a jury, their Lordships were pleased to tear asunder the inseparable concomitants, *charge* and *exculpation*.—The charge, viz. the accusation of robbery, and the proof thereof, they remitted to the knowledge of an assize; but the exculpation they themselves took previous trial of, examined witnesses upon the point, pronounced the madness affected, and then remitted the accusation of robbery to a jury.

After such violent and repeated blows at the right of trial by jury, I cannot help expressing my apprehension, that the Court has already sapped the foundation, and that, unless prevented by the aroused suspicion, by the jealous eye of their country, it only remains for judges who may be possessed of more courage, or more temerity, totally to overturn the fabrick.

I cannot, without some farther remarks, dismiss this momentous subject in a country where the shades of superstition retreat before the light of science;—where the liberties of mankind have been established at a vast expence of blood and treasure;—liberties which, perhaps, totter on the axis, and which, like the twilight, may accompany in its fall the setting glory of Britain.—It is the established law of this country, that no prisoner can be tried by the whole Lords of Justiciary without jury. Is it not then contrary to all reason, that each magistrate of royal boroughs, many of which do not contain a single inhabitant possessed of wealth, of science, or of independence, shall enjoy a power which the law has denied to the collective body of the supreme judges of the nation?—Shall it be said, that, because it is only the lower class of mankind which are commonly tried for petty crimes, that their liberties are not worth protecting? Or, will it be alledged, that scourging, pillory, and banishment, are not terrible punishments? Besides, the mean ideas of those

self-

self-elected men, who, in the decayed boroughs, fill the offices of magistracy, may often lead them to pass over heinous crimes, and to punish the lesser offences with unmeasurable rigour. In the month of September 1784, one of the bailies of Edinburgh sentenced a woman, whom he had convicted of selling butter short of weight, to stand on the pillory, with a label on her forehead denoting her offence, on a market day, at nine in the morning, an hour when the streets swarm with labourers and apprentices, dismissed from their work to breakfast.—No formality of a jury had been used; the bailie had not so much as consulted the city's assessors, whose opinion it was his duty to have taken even in every civil case of the smallest difficulty or importance.—What was the consequence? The rabble, in their rage at being cheated of an ounce of butter, attacked the unhappy woman with such fury, that, had she not been immediately taken from the pillory, they would have murdered her.—*Yet the mob*, so enraged at a culprit for cheating in a few ounces of butter, in the month of June preceding, burnt a distillery worth L. 7000, and would have done infinitely more mischief, had they not been prevented by the repeated interposition of a military force:—*Yet the magistrates*, equally rigorous and informal in punishing the fraud of a silly woman, and dastardly in permitting the outrages of a vile rabble, suffered, without the smallest interruption, a puny mob to beat a drum through the principal streets of the city, nay, before the very door of the city-guard, for the professed purposes of tumult and conflagration. 1754

These opinions, this practice of the Scottish judges, become the more alarming, when we behold the legislative body of the nation introducing a mode of trying offenders distinct from that of jury. In the southern part of the united kingdoms, civil liberty has, for a long period of years, been more respected than in Scotland.

1754 land. An author who has ſimplified the complex and cumberſome maſs of Engliſh juriſprudence; whoſe *writings* have acquired the applauſe of his countrymen, not only as delivering a clear and comprehenſive ſyſtem of law, but as breathing a generous ſpirit of liberty, expreſſes himſelf with a noble ardour in favour of trial by jury *. He ſays, 'It is the moſt tranſcendent 'privilege which any ſubject can enjoy, or wiſh for, that he 'cannot be affected either in his property, his liberty, or his per'ſon, but by the unanimous conſent of twelve of his neighbours 'and equals; a conſtitution that I may venture to affirm has, 'under Providence, ſecured the juſt liberties of this nation for a 'long ſucceſſion of ages; and, therefore, a celebrated French 'writer, who concludes, that, becauſe Rome, Sparta, and Car'thage have loſt their liberties, therefore thoſe of England, in 'time, muſt periſh, ſhould have recollected, *that Rome, Sparta,* '*and Carthage, at the time when their liberties were loſt, were* '*ſtrangers to the trial by jury.*' And again, 'The liberties of 'England † *cannot but ſubſiſt ſo long as this palladium remains ſa*'*cred and inviolate, not only from all open attacks (which none* '*will be ſo hardy as to make,) but alſo from all ſecret machina*'*tions which may ſap and undermine it, by introducing new and* '*arbitrary methods of trial,*' &c. &c. I ſubmit whether it may not excite a juſt alarm to ſee a ſtatute, enacting, 'new and 'arbitrary methods' of trying the delinquents of the Eaſt ‡. I ſubmit whether this may not be one of thoſe '*ſecret machina*'*tions which may ſap and undermine trial by jury.*'

OF

* Blackſtone's Commentaries, vol. 3. p. 379.

† Vol. 4. p. 343.

‡ Act for the better regulation and management of the affairs of the Eaſt-India Company, George III. An. 24. c.

OF LEASING-MAKING.

Trial of Mr John Stewart Commissary of Dunkeld, son to Mr James Stewart of Ladywell, for Leasing-Making against the Earl of Argyle, and fabricating and uttering lies and calumnies contrary to Law.

LEasing-Making was a statutory crime, the invention of tyranny. It meaned originally ' the making, or uttering ' of lies, tending to breed discord between the King and his ' people.' So early as the reign of James I. of Scotland, it inferred a capital punishment, and the offence was the same, whether the calumnies were uttered of the King to his people, or of the people to their King. In succeeding reigns new meshes were added to this snare for life and liberty. Every one who *misconstrued* the King's proceedings, or * who failed to inform upon those guilty of leasing-making, were caught within the net. And it was not till after the death of King William, that the penalty of transgressing these laws was restricted to an arbitrary punishment. 1641

In the year 1641, the Earl of Argyle, with *concurrence* of his Majesty's advocate, brought a criminal indictment against the prisoner for leasing-making, committed by the inventing and

Q uttering

* Statute law abridged, *in voce* Leasing-making.

1641 uttering of calumnious reports, charging that noble Lord with slanderous speeches and disloyal pursuits.

The origin of this trial is thus described by a contemporary writer of good authority. One Graham, a minister *, was challenged before the committee of parliament, which met on the 26th of May 1641, for uttering speeches defamatory of the Earl of Argyle. On being challenged, he named as his informer another minister of the name of Murray. Murray declared that he had the report from the Earl of Montrose. Montrose acknowledged it; declared the report to be, 'that the Earl of 'Argyle had got some young lawyers, and others in his name, 'to present bonds to sundry classes of men, obliging themselves 'to follow the Earl of Argyle as their leader, without any re'servation of the King or of the state; and that the Earl of Ar'gyle had said, that the parliament, at their last meeting, had 'consulted lawyers and divines about deposing the King; that 'they had intended to have done it at the last session of parlia'ment, and would do it on the next.' The indictment added, that the prisoner had sent an account of the whole to Lord Traquair, to be laid before the King. Montrose declared, that Lord Argyle made those speeches in his own tent at the Ford of Lyon, in presence of the Earl of Athole, and eight gentlemen, whom he had made prisoners: That one of these gentlemen was the prisoner, Stewart, and he offered to produce him as his authority.

Immediately on this declaration, Montrose dreading that the prisoner might be tampered with to retract what he had said, to exculpate Argyle, and leave Montrose in the lurch, sent some gentlemen

* Guthrie's Memoirs, p. 79.

gentlemen for him. They brought him to Edinburgh on the 30th of May, and next morning he appeared before the committee of estates, and subscribed a declaration, asserting all that Montrose had affirmed in his name. Argyle, with many oaths, and much passion, denied the whole; and the prisoner was committed to custody in Edinburgh castle. 1641

In a few days, Lord Balmerino, and Lord Dury, one of the Lords of Session, were deputed by the committee to examine the prisoner; and, whatever may have passed at this examination, the prisoner next day wrote a letter to Argyle, exculpating him from the slanderous speeches alledged to have been made at the Ford of Lyon, acknowledging the whole to have been a malicious fabrication of his, the prisoner's, and declaring further, that, by advice of Montrose, Lord Napier, and others, he had transmitted an account of it to the King. And to this he adhered, in a declaration before the committee of estates. On the 11th of June, Montrose, Napier, &c. were imprisoned in Edinburgh castle, and, on the 21st of July, the prisoner, at the instance of the Earl of Argyle, was tried for his life.

Argyle's counsel produced in Court an order of parliament requiring the justices to proceed in the trial, notwithstanding it was contrary to form for * the Court to sit during the meeting of parliament. They produced also a commission from parliament, appointing Lord Elphingstone, the Laird of Aithernie, John Semple, and Sir James Learmonth of Balcomie, assessors to the justices.

The indictment charged the prisoner with the slanderous speeches against Argyle, mentioned above. It also set forth, that

* Records of Justiciary, July 21. 1641.

1641 that for these offences he had been already called before a committee of parliament, and had not only acknowledged his having expressed these calumnies both by word and writing, but also that they were false and groundless inventions contrived by himself: That the committee had thereupon pronounced a decree, declaring these speeches to be false and scandalous: That the prisoner was author of them: That he had thereby committed the crime of leasing-making; and, therefore, the committee of parliament remitted him to the Justice Court to be punished accordingly.

The first plea which the prisoner urged was, 'that the crime 'of leasing-making consisted in defaming the King, not in slandering the subject;' but this, like his other defences, was false, or frivolous, for the tyrannical statutes extend it to both cases. He pleaded, *2dly*, That it behoved the King's advocate to have a special warrant from his Majesty, before he could grant his concurrence to a prosecution raised by an individual on account of his private injuries—a position altogether repugnant to law and practice. And, *lastly*, he alledged, That it was not the committee, but the parliament, that had power to pronounce a decree, an argument altogether frivolous, seeing that the Justice Court were competent to pronounce a judgment in the case, although no guilt had been found either by committee, or by parliament. The prisoner was much more decisive in the steps he took against himself. He repeated before the jury his former confession; and he humbly implored the Earl of Argyle's pardon, and offered to make every acknowledgement.

The jury found the libel proved, and the Court sentenced him to be beheaded at the cross of Edinburgh on the 28th of that month, and the sentence was executed accordingly.

As

As the prisoner's arguments during the trial were frivolous, so his behaviour between the sentence and its execution betrayed great irresolution. It was alledged that he had been induced to take the guilt upon himself, upon promise of indemnity *, in order to screen Argyle from the odious imputation in the speech which Montrose had repeated before the committee of estates: That Sir Thomas Hope advised Argyle, that, if the prisoner was screened from punishment, the world would believe he had been bribed to retract his declaration before the parliament; and, therefore, the prisoner's life was a sacrifice requisite to Argyle's vindication; and that the prisoner underwent the most violent conflict of passions, upon finding, that, by his own false testimony, he had been outwitted of his life. Be this as it may, it certainly shocks us to find a person who took such an active part in the civil wars of Charles I. which terminated in the murder of the King, and overthrow of the state, prosecuting unto death a man for reporting traiterous speeches of him; and it ought no less to warn us against the establishing or countenancing iniquitous precedent, since we little know how soon it may be converted into an engine for our own destruction. For the son of this very † prosecutor fell by an iniquitous sentence on this very charge of *leasing-making*. 1641

John

* Guthrie's Memoirs, p. 80.

† In the state trials, there are three prosecutions to be found for this statutory crime. Those of Lord Ochiltree, Lord Balmerino, and the Marquis of Argyle.

John Niven, Captain of the ſhip Fortune of London, for Leaſing-making againſt James Duke of Albany and York.

1680 THE priſoner was ſerved with a criminal indictment at the inſtance of his Majeſty's Advocate, ſetting forth, that, by the ſtatutory law, and the practice of this realm, *leaſing-making*, the engendering of diſcord between the King and his people, and the uttering ſlanderous ſpeeches to the diſturbance of government, are crimes of a capital nature, yet the priſoner had been guilty of them *, by railing againſt the Duke of Albany and York, the King's brother; by charging him with being in a plot to take the King's life; with combining with the French King to invade England; and with coming to Scotland on purpoſe to make a party to introduce Popery.—Frivolous objections to the relevancy of the indictment were urged for the priſoner, and repelled by the court †.

William

* Records of Juſticiary, July 15. 1680.

† A very unjuſt account of this trial is given by Lord Fountainhall, in his Deciſions, vol. 1. p. 108. The priſoner indiſputably fell within the tyrannical ſtatutes againſt leaſing-making, and there ſeems no doubt of his having been guilty of the fact. Fountainhall is deemed a writer of authority. He was upon the ſide of law and liberty; but any one who is converſant in the affairs of that period, and who compares the reſult of his knowledge with the caſes in Fountainhall, muſt be ſenſible of the extreme partiality of that writer; a propenſity which, in times ſuch as thoſe, it was very difficult to reſiſt.—His partiality is the leſs ſurpriſing, as he appears not to have been untinged with fanaticiſm; and thoſe who have occaſion to compare *his Journals* with the original Records of Juſticiary, will ſee little reaſon to compliment him upon his accuracy.

William Eccles, writer in Edinburgh, depoſed, that, being in Dyſart on the day libelled, in company with the priſoner, and ſome others, the priſoner inquired at the deponent, and the reſt of the company, what ſtile of reception the Duke of York had met in Scotland? To this the deponent anſwered, 'he had been 'received according to his great quality and merit, *and that he 'was a fine Prince;*' and the priſoner replied, there was not one of ten thouſand in England who would ſay ſo. He added, that the Duke of York was in a plot to take the King's life, and had combined with the French King to invade England; but the deponent cannot ſay whether the priſoner expreſſed theſe words as his own opinion, or that of the people of England. The priſoner at the ſame time ſaid, no man had a greater regard than him for the Duke; that, under his Royal Highneſs's conduct, he had loſt part of his blood in his Majeſty's cauſe; and that he would be ready to hazard his life in the Duke's ſervice. 1680

The priſoner objected to William Tarbett, a waiter, being received as a witneſs; but his objections were repelled. Tarbett depoſed, that he was accidentally in Burntiſland, in the houſe of Captain Seaton, where he fell in company with the priſoner, and two Engliſhmen, a ſhipmaſter and his mate, and frequently overheard diſcourſes between them relating to government; and heard the priſoner ſay, that the Duke had come into Scotland to make a party for introducing popery, 'but our good old Engliſh 'hearts would not ſuffer that.'

Michael Seaton, againſt whom alſo the priſoner urged objections which were over-ruled, depoſed, that, in his own houſe in Burntiſland, upon a Sunday in April laſt, he was ſent for into the room where the priſoner, two Engliſh ſeamen, and William Tarbett, were drinking. He heard Niven and the other Engliſhmen

1680 men ſpeaking *extravagant commonwealth language*, and particularly concerning the Duke of York. He could not be poſitive that the words were thoſe charged in the indictment, viz. that he had come to make a party to introduce Popery, but thinks they were to that purpoſe.

The jury, by *a plurality of voices*, *found the priſoner guilty of leaſing-making againſt the Duke of York.*

On the 4th of Auguſt, the Court ſentenced the priſoner to be hanged at the Croſs of Edinburgh on the 18th; but, on the 6th of that month, the Court, in conſequence of an act of Privy Council, proceeding upon a letter from the King, ſuſpended the execution till his Majeſty's further pleaſure ſhould be declared; and it does not appear that the ſentence ever was executed.

OF

OF PARRICIDE.

John Dickson for the Murder of his Father.

THE prisoner, who was son and heir to John Dickson of Bellchester, on the 30th of April 1591, was tried for the murder of his father, committed in the month of July 1588. The criminal record * contains neither the particulars of the murder, nor the evidence against the prisoner, but only that he was convicted by a jury, and sentenced to be broke upon the wheel at the cross of Edinburgh. At this period, and long after, the sentences of the Court of Justiciary frequently express no time for their being carried into execution; it being customary to take the convict directly from the Court to the scaffold. 1591

R OF

* Records of Justiciary, April 30. 1591. Philip Stansfield was tried for the murder of his father, Sir James Stansfield, 1688. See Salmon's state trials, p. 610.

OF MURDER.

Thomas Armstrong for the Murder of Sir John Carmichael of that Ilk, Warden of the West Marches.

1601 THE uncertain and fluctuating limits of two neighbouring nations, which were always jealous of each other, and often hostile, afforded ample field for the depredations of robbers. We find, accordingly, the Scottish borders infested by clans of banditti, who transmitted their predatory pursuits from father to son, like a common profession. The minute and troublesome regulations established by the warden of the English marches, appointing a relief of sentinels, at every pass, by night and day *, within a large district, evince, that the confines of England were no less infested with thieves and robbers.

Their depredations were carried on upon so extensive a scale, and exercised by such numerous bands, as enabled their leaders to live in power and affluence; and sometimes required the whole executive force of the state to crush those robbers. From a statutory prohibition † against persons bringing *Scottish or English thieves in their company to his Majesty's Court*, or to the city of Edinburgh, it appears, that as little discredit had attended their profession, as if they had been plunderers of the East. In the reign of James V. their robberies had arisen to so daring a height,

* Bishop of Carlisle's Border Laws, p. 147. *et seq.*

† James VI. Parl. 11th, chap. 101.

height, that the King, with a military force of about 8000 men, 1601
pitched his camp on the banks of the river Eſk, in order to check these depredations *. Even this mighty force was not thought ſufficient, without the aid of ſtratagem, nay of fraud, to the apprehending of thoſe robbers, whoſe extirpation could alone reſtore peace to the borders. *Johnnie Armſtrang*, the captain of this lawleſs band, kept his reſidence at Gilnockie †, on the river Eſk, between Langholm and Carliſle, where he lived the terror of the neighbourhood: And the Engliſh borders, for many miles, paid him tribute. Being ſeduced by the ſpies of the Court, on the pledge of public faith, he appeared before the King, attended by fifty horſemen, who had laid aſide their hoſtile armour for the ſplendid array of a tournament. They were thrown into priſon; forty-ſeven of them finiſhed a life of rapine and bloodſhed upon growing trees; and one of them atoned for his ſignal cruelties in the flames. Thus, by one act, public faith was broken, and public peace was reſtored.

In the minority of Queen Mary, and of her ſon, and amidſt the convulſions of the reformation, the weeds which had taken ſuch deep root in the borders, and which James V. had endeavoured to eradicate, muſt neceſſarily have ſprung up afreſh. When Queen Mary held a Juſtice-eyre ‡ at Jedburgh, the ravages of a troop of banditti in Liddiſdale made it requiſite for her to deſpatch the Earl of Bothwell, with a military force, to ſuppreſs theſe diſorders. The robbers gave the Earl battle,

 wounded

* Buchanani opera Ruddimanni, v. 1. p. 272.; Leſlie de Reb. Geſt. Scot. Romae 1578, p. 432. Ballad of Johnnie Armſtrang, Scottiſh Songs, Edin. 1776. v. 1. p. 13.

† The ruins of Gilnockie are ſtill to be ſeen about three miles ſouth of Langholm; the lands are now the property of the Duke of Buccleugh.

‡ Buchanani, op. v. 1. p. 348.; Scott's Hiſt. of Scotland, p. 204.

1601 wounded him dangerouſly, and repulſed his followers: And the attention which the Queen ſhowed him upon this occaſion, excited the jealouſy of her huſband, and attracted the obloquy of her people.

Thomas Armſtrong, the priſoner, was tried before the Court of Juſticiary, at Edinburgh, on the 14th of November 1601, for the murder of Sir John Carmichael of *that Ilk* *, warden of the weſt marches. In the indictment which was raiſed againſt him by Thomas Carmichael of Eddrem, the proſecutor, brother to the deceaſed, it was ſet forth, that the priſoner, his father, and many border-thieves and traitors, had aſſembled, of a Sunday, in the month of June 1600, *for the purpoſe of playing at foot-ball.* That, being informed Sir John Carmichael was to hold a Court next day at Lochmaben, they deviſed his murder. Accordingly, the priſoner, and twenty accomplices all completely armed, way-laid the deceaſed next morning, and murdered him as he was going to the Court, by ſhooting him through the body.

The priſoner being convicted by a jury, was ſentenced to be taken to the croſs of Edinburgh, his right hand to be ſtruck from his arm, then to be hanged on a gibbet till he be dead, and his body to be taken to the gallows on the Borough muir, and hung in iron-chains. This is the firſt inſtance I know of in Scotland, of the body of a malefactor being hung in chains. *Adie Scot* †, one of the priſoner's accomplices, was at the ſame time condemned to be hanged.

Aliſter

* Rec. of Juſt. 14th Nov. 1601.

† There was hanged along with the famous *Johnnie Armſtrang*, one of his accomplices, *Adam Scot of Tuſhielaw*, commonly called, *King of the Borders.*

Alister Macgregor of Glenstra, Laird of Macgregor, for Slaughtering the Laird of Luss's friends, and plundering his lands *.

THIS trial, and the subsequent proceedings, relating to the clan Gregor, afford the most characteristic evidence of the barbarous state of the Highlands in those times, of the lawless manners of the people, and despicable imbecillity of the executive arm. 1604

The crimes with which the prisoner was charged, resemble more the outrage and desolation of war, than the guilt of a felon. He was accused of having conspired the destruction of the name of Colquhoun, its friends and allies, and the plunder of the lands of Luss: Of having, on the 7th of February preceding, invaded the lands of Sir Alexander Colquhoun of Luss, with a body of 400 men, composed partly of his own clan, and of the clan Cameron, and of lawless thieves and robbers, equipped in arms, and drawn up on the *field of Lennox*, in battle array: Of having fought with Sir Alexander, who, being authorised by a warrant from the Privy Council, had convocated his friends and followers to resist this lawless host: Of having killed about 140 of Sir Alexander's men †, most of them in cold blood after they were made prisoners: Of having carried off 80 horses,

600

* Rec. of Just. 20th January 1604.; Faculty MSS. vol. 1. p. 214. 215. 369. 503.; Cockburne's MSS. p. 78. 346.

† There is mentioned among the slain, *Tobias Smollet*, bailie of Dumbarton, who must have been of the family of his namesake the celebrated author.

1604 600 cows, and 800 sheep; and of burning houses, corn yards *, &c.

A jury of landed gentlemen of most respectable family sat upon the prisoner. They were, Sir Thomas Stewart of Gairntullie, Colin Campbell of Glenurchie, Alexander Menzies of Weyme, Robert Robertson of Strowan, John Napier *fiar* of Merchistone, *Thomas Fallusdaill burgess of Dumbarton*, John Hering of Lethendie, William Stewart captain of Dumbarton, Harie Drummond of Blair, Charles Blair of that Ilk elder, Chancellor of the jury, John Blair younger of that Ilk, John Graham of Knockdonaine, Moyses Wallace burgess of Edinburgh, Sir Robert Crichton of Cluny †, Robert Robertson of Faskallie. One of these persons, indeed, *Thomas Fallusdaill, burgess of Dumbarton*, ought to have been kept far aloof from this jury. He was the special confident and adviser of the Laird of Luss; and it was in consequence of his suggestion that the Laird made the parade before his Majesty, at Stirling, with the bloody shirts, stained with the gore of his followers. The jury unanimously convicted the prisoner, who, in consequence of the verdict, was condemned to be hanged and quartered at the cross of Edinburgh, his limbs to be

* This was not the first time that the Laird of Luss had suffered from the barbarous depredations of the Macgregors. It appears, that, when the King was at Stirling, on the 21st of December 1602, the Laird of Luss presented himself before his Majesty, and implored his assistance. The Laird was attended by a number of women, corresponding to that of his followers who had been killed or wounded, each displaying as a banner, one of the bloody shirts which his men had on, when killed or wounded by the Macgregors. This was about six weeks before the engagement on the *Field of Lennox*. Letter by *Thomas Fallusdaill burgess of Dumbarton*, dated 19th December 1602, and addressed to the Right Honourable Alexander Colquhoun of Luss, in the archives of that family.

† The *Admirable Crichton* was of this family, and, as he was born A. D. 1551, this gentleman probably was his brother.

be ſtuck up in the chief towns, and his whole eſtate, heritable 1604
and moveable*, to be forfeited. Four of the Laird of Macgregor's followers, who ſtood trial along with him, were convicted and condemned to the ſame puniſhment, eleven on the 17th of February, and ſix on the 1ſt of March; and many pages of the criminal record are engroſſed with the trials of the Macgregors. It became the object of national attention to break this lawleſs confederacy, of which the object was pointed revenge and indiſcriminate plunder, ſupported by uniform contempt of the laws, and reſiſtance to the magiſtrates. A ſtatute was paſſed in the year 1633 †, ordaining, that the whole of the Clan Macgregor which ſhould be within the realm on the 15th of March thereafter, ſhould appear before the Privy Council, and give ſurety for their good behaviour: That each of the clan on arriving at the ſixteenth year of his age, ſhould appear before the Privy Council on the 24th of July, and find ſurety as above required:—That the ſirname of Macgregor ſhould be aboliſhed, and the individuals adopt ſome other:—That no miniſter ſhould baptize a child, or clerk or notary ſubſcribe a bond, or other ſecurity, under the name of Macgregor, under pain of deprivation.

This act was reſcinded at the reſtoration: But it ſeems probable that the Macgregors had aggravated the outrages of a diſorderly life by the unpardonable crime of Jacobitiſm.—The act reſciſſory was annulled, and that againſt the Macgregors revived, in the firſt parliament of William and Mary.—Within theſe few years, however, the ſtate of manners and of government rendered it proper that this act of proſcription ſhould be aboliſhed forever.—The Highlanders, about the ſame period, were gratified in

* Real and perſonal.

† Charles I. Parl. 1.; Act 30. Charles II. Parl. 1. Seſſ. 1.; Unprinted Acts, William and Mary, Parl. 1. Seſſ. 4.; Act 39. George III. An.

1604 in certain other trifles for entering with zeal into the ſervice of the ſtate when others conſpired its ruin. Finally, the forfeited eſtates were reſtored to the heirs of the perſons who were attainted for being concerned in the rebellion 1745; a meaſure which would have been ſtill more generally grateful, could government have beſtowed a like degree of favour on the repreſentatives of thoſe noble families, the deſcendants of thoſe illuſtrious anceſtors, who undoubtedly were much more innocent, much more excuſable, in being concerned in the rebellion 1715.

*Patrick Roy Macgregor for Theft, Sorning *, wilful Fire-Raiſing, Robbery, and Murder.*

1667 IT neceſſarily reſulted from the proſcriptive law mentioned in the former trial, and enforced with ſevere penalties, that ſuch of the clan Gregor as did not yield obedience, became outlaws; became a deſperate banditti, who had no other livelihood than the booty acquired by the moſt criminal outrages. The profligate and rapacious habits increaſed by this act ſurvived the ſtatute itſelf, and gave occaſion to the trial of the priſoner.

Patrick Roy Macgregor, by his activity, courage, and cruelty, had rendered himſelf the moſt celebrated of a formidable band of robbers, that long infeſted the Highlands †. It conſiſted of about

* *Sorning* was a very common crime in the uncivilized parts of the Highlands, and well known in our criminal law. It conſiſted in exacting free quarters by force.

† Faculty MSS. vol. 1ſt, p. 499. 503. vol. 2d, p. 222. 325. 18th January 1666, 25th March 1667.

about forty perſons, whoſe ſtile of life had nouriſhed a ſtrength 1667
and activity of body, and a cruelty of diſpoſition, diſplayed in wanton outrages againſt the feeling of others, yet accompanied with a fortitude that bore, without ſhrinking, the pinching of cold and hunger, and the torture of the executioner. Lachlan Macintoſh, the Captain of this band, about a year preceding, had finiſhed his courſe in the hands of juſtice. The priſoner, who ſucceeded to the command, was a man of robuſt make, but diminutive ſtature. The red hair which grew thick over all his body, indicated his ſtrength, while it added to his uglineſs, and got him the name of *Roy*. His ſtern features beſpoke ferocity; his keen red eyes, and noſe, like the eagle's beak, heightened the terrors of his countenance. And both at his examination, and execution, he bore an uncommon ſeverity of torture, with a patience and fortitude which excited aſtoniſhment.

This banditti had committed violent depredations on the lands of John Lyon of Muireſk, for which Mackintoſh the Captain had been apprehended and executed, and the priſoner declared an outlaw; and a *commiſſion of fire and ſword* iſſued out againſt him. In reſentment of theſe proceedings, the priſoner and his aſſociates plundered the lands of Bellchirries, the property of Lyon of Muireſk. Lyon defended his houſe of Bellchirries, againſt the aſſaults of theſe robbers, till the 30th of April 1666, when they ſurrounded the houſe, brought ſtraw and corn from the barnyard, piled them around the manſion, and ſet the whole in flames. The proprietor and his ſon, a lad of about eighteen years of age, were glad to come out of the houſe, on a capitulation with the robbers, who promiſed them their lives. Having got poſſeſſion of the houſe, the robbers carried off the furniture and arms, horſes and cattle, belonging to Mr Lyon, to the hills of Abernethie, about ſixteen miles diſtant. They alſo carried

 the

1667 the gentleman and his ſon priſoners; and, regardleſs of the articles of capitulation, murdered both father and ſon, leaving their bodies in a field, pierced with redoubled wounds.

The priſoner and his banditti, to the number of forty, proceeded next to aſſault the borough of Keith, levied contributions on the town, and fought with all who oppoſed them. In this aſſault, however, *Roy* was ſo ſeverely wounded as to be unable to make his eſcape. Next day he was apprehended, and was conducted, under a ſtrong guard, to the tolbooth of Edinburgh.

On the 25th of March he was brought to trial; and a complete proof being led of his manifold crimes, he was ſentenced to be taken, on the 27th of that month, to the croſs of Edinburgh, his right hand to be cut off, and then to be hanged till he be dead, and his body to be hung in chains on the gallows between Leith and Edinburgh. The executioner mangled him ſo ſhockingly, in the diſcharge of his duty, that he was next day turned out of office. Patrick Drummond, the aſſociate of the priſoner's guilt, was, at the ſame time, the companion of his ſufferings.

Agnes Johnſton, for the Murder of —— Lamb, a child.

1674 AGNES JOHNSTON was proſecuted by Sir John Niſbet of Dirleton, Lord Advocate, for the murder of —— Lamb, daughter of John Lamb in * Airth, and grand-niece to the priſoner. It was charged, in the indictment, that, about three months

* Records of Juſticiary, 19th February 1674.

months preceding, the prisoner, who lived with the parents of the deceased, took an opportunity, when there was nobody in the house but herself and the child, to take the infant, who was about eight months old, out of its cradle, lay it in a bed, and cut its throat. 1674.

The Lord Advocate produced against the prisoner her own confession, emitted before the Lords of Justiciary on the 6th of January preceding. She confessed that she killed the child about forty days before. She declared, that the parents had given her no provocation; but that, several times before she committed the murder, *there was a spirit within her that did draw her neck together*. When she was in these fits, it was sometimes alledged that she did but feign sickness; on which account the people threatened to turn her out of the house, and, in resentment thereof, she cut the child's throat: That, before committing the murder, *the spirit had frequently tempted her to make away with herself*. In particular, she once attempted to drown herself in a well at Clackmannan; but there being little water in it, she cried to a servant of the Laird of Clackmannan's, who helped her out. She declared, that she did not tell any body of her being thus tempted, *nor had she power to tell*; that she began to be troubled with the spirit about Fastren's-even preceding; that she was unmarried, and about fifty years of age. She adhered to this confession before the court and jury.

The jury, after *reasoning and voting*, found the prisoner guilty. She was sentenced to be hanged in the Grass-market on the 21st of February, that is, after an interval of one day; and her moveable goods to be forfeited.

1674 The conviction of this poor woman was an act of great inhumanity and injustice. The Court ought to have appointed counsel for her; the judges ought themselves to have been her counsel. As the only proof adduced against her was her own confession, it must be held to be true in all its parts; and, by the confession, it is obvious that the woman was greatly disordered in mind. She had been troubled with hysterical convulsions, which are often accompanied with deep melancholy, and this she called *the spirit.* And, in her, the melancholy was so great as to deprive her of the use of her judgment; which is plain from her having, without any other motive, been frequently inclined, and once having actually attempted to put herself to death. It was not her crime to have killed the child; it was her misfortune to have lost her judgment.

Andrew Rutherfoord of Townhead, for the Murder of James Douglass, brother to Sir William Douglass of Cavers.

THE prisoner was accused of having conceived deadly malice against the deceased: That, having dined together in a farmer's house on the 9th of July preceding, in company with several gentlemen, the prisoner, urged by this malevolent passion, on their way home * from dinner, within half-a-mile of the town of Jedburgh, did murder the deceased, by giving him a mortal wound with a small sword through the arm, and through the body under the right pap, of which wounds he died within four hours: That the prisoner immediately fled to England, and would

* Records of Justiciary, 6th and 10th November 1674.

would have embarked at South Shiells for Holland, had he not been apprehended. The prisoner pleaded self-defence. 1674

Robert Scott of Horslehill deposed, That, about ten at night of the 9th of July, the deponent, Charles Ker of Abbotrule, William Ker of Newton, and their servants, the prisoner, and the deceased, after dining at Swanside, called in the evening at the house of John Ker at Berchope, in their way to Jedburgh. The deceased was riding a little way before the deponent; and the prisoner, who was at a distance behind, galloped up beyond the deponent to the deceased. They rode a little way together, then alighted and drew their swords. The deponent knew not which of them drew first; but, on galloping up, he saw them pushing at each other, and called to them to desist; but, before he could alight, they were in each other's arms. The witness asked, if there was any hurt done? to which the prisoner answered, none that he knew of; but, at the same time the deceased held out his right hand, and said, he had got blood. The witness demanded their swords, which they immediately delivered to him: Instantly thereafter the deceased sunk down, and the prisoner fled. A surgeon was sent for from Jedburgh, they being but a quarter of a mile from the town. By his order, the deceased was put on a horse, a man sitting behind, and one walking on each side. When they arrived at Jedburgh, the deceased was laid on a bed, the surgeon probed the wound in his arm, and also that in his breast behind the right pap. The deceased died within two hours after receiving the wounds. Both in the field, and when laid in bed, the deceased exclaimed, 'Fie! fie! that I 'should be affronted by such a base man!' The witness did not hear the deceased say he was wounded before he drew; as little did he hear him urge any thing before his death in vindication

of

1674 of the prisoner. The witness returned the prisoner his sword. All the company had drank freely.

The surgeon deposed, that he thought the wound in the breast slight, and that the deceased died of the wound five inches long in his arm, an artery being pricked.—Three witnesses were adduced for the prisoner, who deposed *nihil novit in causa*. A woman was then cited on his behalf, but the King's Advocate *objected to a woman being admitted a witness*; and the Court *refused to receive her*, as there was 'no *penuria testium* * *tempore* '*mortis*.'

The jury returned their verdict on the 12th of November, unanimously finding the prisoner guilty; and, on the 16th, the Court passed sentence of death upon him, ordaining him to be beheaded on the 25th, at the Cross of Edinburgh.

George Clerk and John Ramsay, for the Murder of John Anderson Merchant in Edinburgh.

1676 JOHN RAMSAY, servant to the deceased John Anderson, and George Clerk, late servant to Mr John Clerk of Pennycuik, were prosecuted for the murder of John Anderson merchant in Edinburgh, at the instance of Mr John Clerk of Pennycuik, and James Clerk merchant in Edinburgh, nephews to the deceased, and of Sir John Nisbet of Dirleton, his Majesty's advocate.

The

* No scarcity of witnesses at the time the deceased expired.—This offspring of ignorance and barbarism, the refusing to admit women as witnesses, unless none other were to be had, was a rule of the law of Scotland previous to this century.

The indictment sets forth, that the prisoners lived in the house with the deceased *, and waited on him at the time of his death, and for some months preceding. The deceased was an unmarried person, and had nobody living in the house with him but the prisoners, who perfidiously abused the trust reposed in them. When their master was counting his money, having the room door shut upon him, they were in use to rap at the door, and, when he opened it, they slipped in and stole part of his money. The season was very sickly: A flux, in particular, raged with such violence, that many died of it daily; and it was deemed so contagious, that those who were not infected were afraid to approach the sick from the danger of infection. The prisoners conspired to bring this disease upon their master. They consulted one Kennedy, apprentice to Thomas Henryson apothecary in Edinburgh, in the month of October or November preceding, and got from him some purgative powders and drugs, which they administered to the deceased in his drink and otherwise. The first purging powder wrought slowly. They then got a white powder which operated to their wishes, so that the deceased had recourse to Hugh Brown apothecary, his ordinary medical adviser. The prisoners took advantage of the sickness they had brought on him, by combining to steal his money and jewels, which he kept in an iron chest. That they might steal with the greater security, they also applied to Kennedy for intoxicating, or soporiferous draughts; obtained from him a medicine which he called syrup of poppy, and gave it to their master when he was bad, and keeping the house, without his knowledge, or that of Brown his apothecary. It was mixed in his drink, and he fell in a deep sleep. They took out his keys, opened his chest, carried off a large gold chain, gold bracelets, a gold 1676

* Records of Justiciary, January 17. 1676.

1676 gold ring with a blue ſtone, two pieces of gold, twelve of ſilver, and five *purſe-pennies*, ſilver buttons, broatches, and various other articles. They then got from Kennedy ſeveral drugs, which he called powder of jalap, and cryſtal of tartar, which they gave to their maſter. Clerk told Kennedy, that their maſter being ill, they had ſtole ſeveral pieces of coin from him, and that there were three bags of money in his cheſt; that they were reſolved to take ſome of it, and would give Kennedy a part.—They gave the jalap and the tartar to their maſter to counteract the effect of Brown's preſcriptions.

On the Wedneſday preceding their maſter's death, which happened on Monday the 15th of November 1674, Anderſon's friends viſited him, and he told them he was greatly better. On this, the priſoners fearing his recovery, and that he ſhould diſcover their practices, came to a poſitive reſolution to murder him, communicated it to Kennedy, and ſought poiſon from him to effect their purpoſe. But Kennedy would not give poiſon, ſaying the body would ſwell, and ſo they would be diſcovered; but he would give a powder which would do the buſineſs ſlowly, and which he would engage would kill their maſter in a month. They got a powder accordingly, which Kennedy called powder of jalap, but which, either in quality, quantity, or frequency of being adminiſtered, was truly poiſon. On the five days immediately preceding his death, the priſoners, and their aſſociate Kennedy, held frequent conſultations in the ſhop of Kennedy's maſter, in the houſe of the deceaſed, and in the King's park. They gave Kennedy part of what they had already ſtolen, and promiſed him an equal ſhare of their future plunder. On Saturday night, the deceaſed was ſo well, that his apothecary ſaid he would not viſit him next day. On Sunday he was not thought near death, but roſe, dreſſed himſelf, and

ſupped

ſupped in his uſual ſtile. On Sunday night, the priſoners mixed 1676
ſome drugs in conſerve of roſes that had been preſcribed for him by his own apothecary. Theſe were ſo poiſonous that he died on Monday morning at ten o'clock.—At five o'clock, their maſter called for the bed-pan, which they gave him. They then ran to the iron cheſt, filled their hands with jewels, goods, and money belonging to their dying maſter, and did not look near him till about eight o'clock, when they found him ſpeechleſs, the white of his eyes turned up, and the bed ſwimming around him. They then called in the neighbours to ſee him die.

Both the priſoners emitted confeſſions correſponding in general to the charge in the indictment. They added, that, before they conceived the idea of giving their maſter drugs to bereave him of life, they had frequently been in uſe to infuſe powders in his drink, which made him outrageouſly drunk, that they might make ſport of him in his drunkenneſs: A dreadful leſſon to beware of the firſt ſteps in vice. Had they not infuſed powders to make their maſter drunk, in order to gratify a barbarous, and diſreſpectful mirth, the idea of taking away his life by ſimilar means would not have occurred to them. They were convicted, and ſentenced, on the 8th of February, to be hanged at the croſs of Edinburgh on the 1ſt of March, and their moveable goods to be forfeited.

The trial of Kennedy, the apothecary's prentice, for furniſhing the medicines, was brought on upon the 22d of February 1676, and, after various adjournments, and a tedious confinement of eighteen months, he, on his own petition, on the 30th of July 1677, was baniſhed for life.

James Gray litster in Dalkeith, for the Murder of Archibald Murray, Gentleman of his Majesty's Troop of Guards.*

1678 THE prisoner, by profession a dyer, was a Lieutenant in the Duke of Lauderdale's regiment of Lothian militia. It happened that this corps, and the troop of guards to which the deceased belonged, were quartered at Glasgow. The prisoner was prosecuted at the instance of Sir William Murray of Newton, father to the deceased †. The indictment set forth, that the prisoner and the deceased, in company with some others, were drinking in the house of James Brown bookseller in Glasgow. The deceased retired, the prisoner followed, and, conceiving deadly malice against him, killed him with a small sword.

Mr John Ellies appeared as counsel for the prisoner. He said that, deadly malice being charged against the prisoner, it was incumbent on the pursuer to prove that quality in the indictment. That, if any homicide was committed, which, however, he denied, it was done in self-defence. The prisoner and the deceased had no previous quarrel; they had not even the most distant acquaintance till the night on which the deceased expired; and the inferior station of the prisoner made it presumable that the deceased was the aggressor. He offered to prove, that the prisoner had received provoking language from the deceased: That, after the death, the prisoner, far from denoting guilt by flight, came back to the company, and sat with them for two hours; and

* Dyer.

† Rec. of Just. 10th June 1678.; Fountainhall's Decisions, vol. 1. p. 1.

and that another person was present at the scuffle, with a drawn sword, by whom the wound might be given. He insisted, that *jurymen were unfit judges to determine upon circumstantial evidence*: That the Privy Council were wont, in matters of this sort, to take previous cognition; and they did so, particularly in the case of Thomas Menzies; and he prayed the Lords of Justiciary to make previous inquiry into the circumstances. 1678

Sir Robert Sinclair, counsel for the pursuer, answered, that it being libelled that the prisoner did kill the deceased, was in itself relevant, if proved, to convict the prisoner, without any proof of malice, '*that being no necessary qualification of the libel, but the* '*words of stile.*' And in our law there is no difference as to the crime, or the punishment of death, and confiscation of moveables, whether the killing proceeded from malice preconceived, or upon sudden rencounter or chaudmell; for a slaughter being committed, it must be presumed to be done out of malice: That, as to drawing a conclusion of self-defence from the circumstances of this case, these circumstances were altogether frivolous; for, although the act 1661, chap. 22. sustained the plea of self-defence, yet it could only be admitted *salvo moderamine inculpatae tutelae.*

Mr Ellies, in his reply for the prisoner, persisted that a jury was very unfit to judge on a circumstantial proof, and requested the Lords to appoint a precognition to be taken.

The Lords found the indictment relevant, and that there was no necessity to lead a separate proof to establish forethought malice.

 The

1678 The following circumſtance gave riſe to the quarrel: The parties being heated with wine, the quarrel aroſe from the priſoner's ſaying, 'That a lieutenant to the Duke of Lauderdale was as 'good as to ride in the King's guard.' On this the deceaſed ſtormed, called the priſoner baſe fellow, to compare himſelf with gentlemen, and gave him the lie.

THE PROOF.

George Murray, gentleman of his Majeſty's troop of guards, depoſed, he was drinking in the houſe of James Brown, in company with the priſoner, the deceaſed, and others. The deceaſed gave the priſoner the lie. Within half an hour thereafter, the priſoner and the deceaſed left the room, and the deponent ſent one Thomas Hamilton to inquire after them. Inſtantly Hamilton and the priſoner returned, and the priſoner, wiping his ſword, ſaid, '*He had given him it.*'

James Hamilton of Little Preſton depoſed in terms of the preceding witneſs, with this variation, that the priſoner ſaid, 'He '*was afraid* he had done it.'—Edward Watſon ſaw the priſoner and the deceaſed fighting with drawn ſwords; the deceaſed went to a bookſeller's ſhop to look at his wound, ſtaggered, and fell on the ſtreet.—Lieutenant Joſeph Douglaſs heard the priſoner, on being taken into the guard, ſay, he had parried two or three thruſts made at him by the deceaſed.—John Bain heard the priſoner ſay, the deceaſed had made three or four thruſts at him. —John Paterſon, gentleman of the guards, heard the priſoner acknowledge he had killed the deceaſed, and declare, that, if it were to do, he would do it again.—Enſign George Murray heard the priſoner ſay, the deceaſed and he had been combating, and that he was ſorry the wound was not through the deceaſed's heart.

heart.—Thomas Hamilton depoſed, that, after words had paſſed between the priſoner and the deceaſed, they went down ſtairs together, and drew: He heard the priſoner ſay, he was afraid he had killed the deceaſed.—Hall the ſurgeon depoſed, that the wound and the priſoner's ſword tallied; the wound was ten inches deep, and the deceaſed died of it in forty-eight hours. The priſoner ſent for the deponent the day after the combat, and deſired him to uſe all means under heaven for the deceaſed's cure. 1678

The jury pronounced the following verdict: 'Find the priſoner did commit the ſaid ſlaughter upon the deceaſed Archibald Murray, and that with one vote. As to the ſecond part, relating to the pannel's ſelf-defence, the aſſize finds no ſuch thing proven; but, on the contrary, that the pannel and the deceaſed came both out from the company, moſt likely upon one and the ſame deſign.' He was ſentenced to be beheaded at the Graſs-market on the 3d of July, and his moveables to be forfeited. Much intereſt was uſed to obtain him a pardon: The Privy Council granted him a ſhort reſpite; but, as the Duke of Lauderdale declined to interfere in obtaining him a pardon, the ſentence was executed on the 19th of July, and he ſuffered with great reſolution.

John

John Chislie of Dalry, for the Murder of the Right Hon. Sir George Lockhart of Carnwath, Lord President of the Court of Session, and Member of his Majesty's Privy Council.

1689 THE prisoner was brought to trial before Sir Magnus Prince, Lord Provost of Edinburgh, as high sheriff within the city, and James Graham, John Charteris, Thomas Young, and William Paton, bailies; the murder having been committed within the city.

The prisoner was brought before the Lord Provost on the 1st of April 1689, to be examined concerning the murder of Sir George Lockhart, committed on the day preceding. Sir John Lockhart of Castlehill, brother, and Cromwell Lockhart of Lee, nephew of the deceased, appeared in Court, and, in their own name, and in that of the children of the deceased, gave in an act of the meeting of estates of Parliament, passed that very day, of the following purport: That the Estates having considered the supplication of the friends of the deceased Sir George Lockhart, for granting warrant to the magistrates of Edinburgh to torture John Chislie of Dalry, perpetrator of the murder, and William Calderwood writer in Edinburgh, an accomplice; therefore, *in respect of the notoriety of the murder*, and of the extraordinary circumstances attending it, the Estates appoint and authorise the Provost and two of the bailies of Edinburgh, and likewise the Earl of Errol, Lord High Constable, and his deputes, not only to judge of the murder, but to proceed to torture

ture * Chislie, to discover if he had any accomplices in the crime. 1689
And they appoint two of each bench †, viz. the Earls of Glencairn and Eglintone, Sir Patrick Ogilvie of Boyne, Sir Archibald Murray of Blackbarony, Sir John Dalrymple, younger of Stair, and Mr William Hamilton, advocate, assessors to these judges. The Estates, at the same time, declare, that this extraordinary case shall be no precedent to warrant torture in time coming, nor argument to ratify it as to the time past.

The Lord Provost then entered a protest, that this act of the Estates of Parliament should not infringe the ancient liberties of the city; and Mr David Drummond advocate, one of the Earl of Errol's deputies, protested, that the Lord High Constable's absence should not affect his right to judge in the like cases, the murder having been committed during the meeting of the Estates. Being desired to concur with the magistrates in sitting on this trial, he refused to sit, unless the Earl of Errol, or his deputies, were sole judges.

The prisoner was then put to the torture, and declared that he was not advised to the assassination of Sir George Lockhart by any person whatever: That, when at London, he told James Stewart advocate, that, if he got no satisfaction from the President, he would assassinate him; and told the same to a person there

* By the act and declaration which the Estates of Parliament passed, just ten days after this trial, declaring King James to have *forfaulted* the crown, by illegal assumption and exercise of power, they declared, 'That the use of torture, 'without evidence, and in ordinary crimes, is contrary to law.' Act of Estates, 11th April 1684. † The Scottish Parliament composed but *one house*. It consisted, after the Revolution, of three classes, the Temporal Peers, the Barons, i. e. knights of the shire, and the Burgesses, or representatives of the royal boroughs.

1689 there of the name of Callender, and to Mr William Chiſlie his uncle. He confeſſed that he charged his piſtol on Sunday morning, and went to the New Kirk, and having ſeen the Preſident coming from the church, he went to the cloſe where the Preſident lodged, followed him, and, when juſt behind his back, ſhot him: That he was ſatisfied when he heard of the Preſident's being dead; and, on hearing it, he ſaid, '*he was not uſed to do things by halfs.*' He alſo confeſſed, that, when at London, he walked up and down Pall-Mall with a Piſtol beneath his coat, lying in wait for the Preſident.

The indictment againſt the priſoner was raiſed at the inſtance of John Gibſon, procurator-fiſcal of the city of Edinburgh, of Sir John Lockhart of Caſtlehill, and Cromwell Lockhart of Lee. It ſet forth, that aſſaſſination, murder, and man-ſlaughter, were contrary to the laws of God, Nature, nations, and the laws and acts of Parliament of this kingdom: That, neverthelefs, the priſoner had, of forethought felony, without the leaſt provocation, murdered Sir George Lockhart in the manner already mentioned: That the priſoner was caught *red-hand* * by a multitude of witneſſes, before whom he boaſted of what he had done, as if it had been ſome grand exploit: By all which he was guilty of murder, or at leaſt was *art and part* acceſſory to the ſame; for which he ought to be puniſhed with death, and his moveables confiſcated.

The jury conſiſted of ten landed gentlemen and five merchants of Edinburgh.

The

* *Red-hand* is a term in the Scottiſh law, ſignifying a criminal's being caught in the fact. *Art and part* is alſo a term in our law, denoting that the perſon to whom it is applied is aiding and abetting in the caſe. *Art and part* is a tranſlation of *ope et conſilio.*

The prisoner judicially confessed the crime libelled, and declared, that he committed the murder because he thought the deceased had given an unjust sentence against him. Being asked, 'If it was not a sentence pronounced in favour of his wife and 'children for their aliment? he declared he would not answer to 'that point, nor give any account thereof.' 1689

Witnesses were then adduced, who deposed as follows:

James Stewart advocate deposed, that, in the month of September or October preceding, the prisoner discoursing with him concerning the injustice done to the prisoner in a decreet-arbitral pronounced by Sir George Lockhart and Lord Kemney, in favour of his wife and children, for an aliment, said, he was resolved to go to Scotland before Candlemas and kill the President; to which the witness answered, it was the suggestion of the Devil, and the very imagination of it a sin before God. To this the prisoner replied, '*Let God and me alone; we have many* '*things to reckon betwixt us, and we will reckon this too.*' The witness told this to many, and understood that the President was informed of the prisoner's menaces, but despised them.

Mr William Chislie writer to the signet deposed, That he had not seen the prisoner since April 1688, who then expressed his resentment against Sir George Lockart, threatening to assassinate him for having decreed an aliment of 1700 * merks yearly to the prisoner's wife and ten children. The witness told the President of it, but he despised the threat.

Mr Daniel Lockhart advocate, and Mr Alexander Walker student of divinity, saw the prisoner shoot the deceased. They

 seized

* About L. 93 Sterling.

1601 ſeized him, and the latter of theſe witneſſes aſſiſted in carrying him to the guard. When ſeized, the priſoner ſaid, 'he had 'done the deed, and would not fly, and that was to learn the 'Preſident to juſtice.'

Sir David Hay Doctor of medicine, was going to viſit the Preſident's Lady. As he entered the cloſe *, he ſaw the Preſident ſtagger and fall to the ground. He bled at the mouth, was carried into his houſe, laid upon ſome chairs, and immediately expired. He ſaw John Baillie ſurgeon probe the wound. The ball went in at the back, and out at the right breaſt.

The jury all in one voice, by the mouth of Sir John Foulis of Ravelſtoun, their chancellor, (*i. e.* foreman), found, by the priſoner's judicial confeſſion, that he was guilty of the murder of Sir George Lockhart, &c. &c.; and by the depoſition of witneſſes, that he was guilty of '*murder*, *out of forethought felony*.' —The verdict was ſubſcribed by the whole jury.

The Lord Provoſt and Bailies of Edinburgh ſentenced the priſoner to be carried on a hurdle from the tolbooth of Edinburgh, to the market croſs, on Wedneſday the 3d of April inſtant; and there, between the hours of two and four of the afternoon, to have his right hand cut off alive, and then to be hanged upon a gibbet, with the piſtol about his neck, with which he committed the murder. His body to be hung in chains between Leith and Edinburgh; his right hand fixed on the Weſt-port, and his moveable goods to be confiſcated.

Beſides

* It was the cloſe in the ſouth ſide of the Lawn-market, now called *the Bank cloſe*, from the Bank of Scotland being there.

Besides Sir George Lockhart, two other of the supreme judges in Scotland have been murdered: All of them on account of causes to which they were either party or judge. Robert Galbraith, parson of Spot, one of the Senators of the College of Justice, on the 13th of February 1543, was murdered by John Carkeitill, and his accomplices, on account of some favour shown to Sir William Sinclair of Herdmanstoun *. As the records of Justiciary for that year are missing, I know not whether the murderers were brought to punishment.—John Graham, parson of Killearn, and one of the supreme criminal judges, married the widow of Sandilands of Calder, who was amply endowed by her former husband. Graham commenced and carried a distressing lawsuit against young Sandilands, his step-son; and Sir James Sandilands, uncle and tutor to the young gentleman, assisted by a body of his friends and followers, in revenge murdered Graham in Leith-wynd, one of the principal avenues to the City of Edinburgh, on the first of February 1592. The perpetrators were neither brought to trial nor punishment. But seven years after, the grand-father, or grand-uncle of the great Montrose, attacked Sir James Sandilands, with an armed force, as he was going into the Court of Session; and, after obstinate resistance, left him desperately, and, as the assailants thought, mortally wounded. By a late statute, to kill any of the Lords of Session, or Justiciary, when in the exercise of their office, is declared to be high treason. 1689

* Books of sederunt, 13th February 1543. MSS. Memoirs of the family of Herdmanstoun. *Johnstoni Historia Rerum Britannicarum, p.* 172. 253. Annae, An. 7. cap. 22.

John Master of Tarbet, Ensign Andrew Mowat, and James Sinclair Writer in Edinburgh, for the Murder of Elias Poiret Sieur de la Roche.

1691 THE prisoners were indicted at the instance of George and Isaac Poirets, Sieurs de la Roche, Frenchmen, Protestant refugees, and gentlemen of his Majesty's troop of guards, and of Sir William Lockhart Solicitor General. The indictment contained a charge against the prisoners, of entering, on the eighth of the preceding month of March, about twelve at night, into the bed-chamber of George Poiret *, one of the pursuers, while he lay sleeping in bed, in the house of John Brown vintner, Leith, in which house he was quartered, and giving him wounds to the effusion of his blood: That, upon their being removed out of the room, they returned, and endeavoured to break open the door. On this George rapped on the ceiling of his room for his two brothers, who slept in the room above, to come to his assistance. They came accordingly, half clothed, and totally unarmed; and the prisoners, all of whom were armed, did violently assault them, gave them many wounds, and run the deceased Elias Poiret through the body with a sword, of which he instantly died.

The prisoners recriminated, by presenting an indictment, at their instance, charging the Sieurs de la Roche with assassination and murder. It set forth, that the Master of Tarbett, Mowat and Sinclair, on the night libelled, were obliged, by a heavy storm,

* Records of Justiciary, 18th August 1691.

ſtorm, to take ſhelter in Brown the vintner's houſe. While they 1691
were ſitting quietly at the fire-ſide in the hall, drinking ſome ale, till beds ſhould be got ready for them, George, Iſaac, and Elias Poirets, and James de la Maſſie, another Frenchman, having formed a conſpiracy to murder them, entered the hall with cocked piſtols in their hands, and ſwords under their arms; the Maſter of Tarbet, and his companions, being then totally unarmed. They fired two piſtols loaded with ball, at the Maſter of Tarbett, and then, with drawn ſwords, attacked the company, who were much wounded, by parrying the thruſts with their hands; and, in the ſcuffle, there being but little light in the room, the Sieurs de la Roche did murder the deceaſed Elias Poiret, their own brother.

After long arguments, which it is unneceſſary to tranſcribe or abridge, the Court ſuſtained the libel againſt the Maſter of Tarbett, Mowat, and Sinclair; and found the defences offered for the Frenchmen relevant to ſet aſide the indictment againſt the latter.

The jury were Lord Bargenie, William Baillie of Lamington, James Nicolſon of Trabroun, Sir Robert Gordon of Gordonſtoun, Thomas Hay of Balhouſſie, Sir George Sutty of Balgony, Sir William Ker of Greenhead, John Keirie of Gogar, John Scot of Rhynolds-burn, William Calderwood of Pittedy, Sir William Binning of Wallyfoord, Sir James Fleming of Rathobyres, James Scot of Bowhill, Sir James Dick of Prieſtfield, and Peter Wedderburn of Goſsford.

The priſoners objected to the receiving of James de la Maſſie as a witneſs, on account of intemperate expreſſions of malice and

1691 and refentment; and the fact being proved, the witnefs was repelled.

Chriftian Erfkine, late fervant to John Brown vintner, Kirkgate, Leith, depofed, that the Mafter of Tarbett went into George Poiret's chamber after twelve at night, and the deponent hearing a little noife in the chamber, went in with a candle, and faw the Mafter of Tarbett ftanding at George Poiret's bedfide, and the faid George fitting up naked in his bed, the bed-clothes at his feet, his night cap off, and a little drop of blood on his cheek. They were fpeaking French together angry like; the deponent called for Enfign Mowat, who was fitting at the fire-fide in the hall, for fhe thought him the fobereft of the company; at the fame time, fhe could not pronounce any of them drunk. Upon Mowat and another perfon's coming into the room, the Frenchman took down his fword, which thefe two and the Mafter of Tarbett forced out of his hand. She faw no blows at that time, but entreated Mowat to take the Mafter of Tarbett and the other perfon out of the room, which was done accordingly; and the other perfon, *who was none of the prifoners*, carried the Frenchman's fword with him out of the room into the hall. Mowat defired the witnefs to keep the door clofe, and none of them fhould come back again. None of them had arms when they were in the Frenchman's room, except the fword which they had wrefted from him, as mentioned above. Soon after, the Mafter of Tarbett (as the deponent fuppofed) came back, and rapped once or twice at the door, faying, he would be in, to which fhe made no anfwer. But, before the Mafter of Tarbett came again to the door and rapped, George Poiret got out of his bed, and rapped with the tongs on the roof of the room; and, in as fhort fpace as the Frenchmen could put on a few clothes, they came to George Poiret's chamber door, and fpoke French to him, but did not

not enter his room, and then went to the hall. The deponent 1691
then heard a noiſe in the hall, and ſome folk ſpeaking Scots, and immediately after heard the ſhot of a piſtol, and ſaw the ſmoak, but knew none of the people where the piſtol was fired ſave Iſaac Poiret, whom ſhe thereupon pulled back, and found him with a drawn ſword in his hand, his hand ſtreaming with blood, and his little finger almoſt cut off. As ſhe was coming back with Iſaac in order to get him into his brother's chamber, ſhe found a man under her feet in the floor, which turned out to be Elias Poiret lying dead. She ſaw a drawn ſword or two in the company, but cannot ſpecify who held them. She did not ſee the priſoners wound any of the Frenchmen, or kill the deceaſed; and the deceaſed's ſword was not drawn: Nor did ſhe ſee the priſoners in the room after the deceaſed was killed. When Enſign Mowat was brought into the room where the dead body lay, he did not wax pale, as charged in the indictment, but looked very well upon it, deſired to ſee the body, and aſked the deponent, If ſhe knew who killed him? The deponent added, that the Maſter of Tarbett had ſeen a coach at the door, and aſked her if it was to hire, and to whom it belonged? and ſhe anſwered, it was hired by the Laird of Mey, who was in the houſe; upon which the Maſter of Tarbett ſaid, he would ſee him; and ſhe ſhowed him into the room accordingly. The witneſs farther added, that the occaſion of the Maſter of Tarbett's leaving the fire ſide where he ſat, and going into George Poiret's room, was to follow Jean Thomſon, whom he ſuppoſed to have gone into that room. The priſoners had laid aſide their ſwords in the room where they were to lodge, as had the Maſter of Tarbett his periwig, before they entered Poiret's room; and Sinclair, the other priſoner, was aſleep in Mey's room an hour before the diſturbance happened.

Jean

1691 Jean Thomſon, late ſervant to John Brown vintner, aged nineteen, depoſed, That, on the night libelled, between twelve and one, the Maſter of Tarbett being in her maſter's houſe, and calling for a drink of ale, deſired the deponent to ſit down by him, which ſhe refuſed, but afterwards ſhe ſat down. Being called to draw ale, ſhe went to the cellar and drew the ale; when ſhe came up, ſhe did not go into the room where the Maſter was, but ſat down on a cheſt at a bed-ſide, where the Maſter came and ſat down beſide her; upon which ſhe roſe, went into a room where ſhe uſed to lie, and bolted the door: But hearing a noiſe in George Poiret's room, ſhe came to the door of that chamber, where ſhe found Enſign Mowat, the other ſervant having before that carried in a light, on account of the noiſe. Mowat carried the Maſter of Tarbett and another perſon out of the room in his arms; and, when Mowat was thus taking them out, the Maſter of Tarbett ſaid to him, *he would go back and crave the gentleman's pardon.* Soon after, the Frenchmen came down ſtairs, armed with ſwords and piſtols; their ſwords not drawn at that time. They ſpoke to their brother George, and then went through the hall, Iſaac Poiret having his ſword drawn. The Maſter of Tarbett and Mowat were then in the hall; ſhe did not ſee them have any arms, nor aſſault the Frenchmen. At the ſight of a drawn ſword, and the command of her maſter, who by this time was in the hall, ſhe went out to call the guard, and, as ſhe went down ſtairs, heard a ſhot. This witneſs concurred with the former in depoſing, that, long before any diſturbance happened, Sinclair, one of the priſoners, was aſleep in another room; and that the Maſter of Tarbett and Mowat, on their coming into the houſe, laid aſide their ſwords in the room where they were to ſleep.

John Brown vintner deposed, That, on the night libelled, he was in bed in a little room off the hall, and knew nothing of the disturbance in his house till Jean Thomson rapped at his door. On this he rose hastily, and heard a great noise and crying in the hall; and, when he came there, he found Elias Poiret lying dead, and nobody in the room beside him but Christian Erskine. He went instantly to call the guard; and, on his return, when they were removing the body, he found a pistol in the floor, snapped and charged, and a sword in the scabbard. As he returned from calling the guard, he raised several of the neighbours; one of them, Robert Aitcheson, told him he had seen one of the murderers pass. Upon this the witness took a candle and lanthorn to a fore-stair, where Aitcheson said the murderer was, and there he found Ensign Mowat, standing behind a deal, on a knocking-stone * under the fore-stair. He was desired to come out, but made no reply for a good space. The company and constables then presented muskets to him, upon which he came out, and the company and constables took a sword from him, which they delivered to the deponent, who, however, did not see the sword taken from him, he being surrounded by the people. The sword was naked, much bent, and bloody both in blade and hilt. The witness ordered the constables to carry Mowat straight to prison; and, next day, when he went with the magistrates to the prison, he saw Mowat's right hand with a wound on it. He was also present when the surgeon compared this sword with the hole in the deceased's coat, and the orifice of the wound: It corresponded with the hole in the coat, and the surgeon said it did the same with the wound. The witness added, that the Master of Tarbett came to his house, on hearing

1691

X that

* A knocking-stone is a stone mortar, formerly much used by the common people for beating the husk off barley ere they put it in the pot.

1691 that the Laird of Mey and Mowat were there; that the coach being gone and the night rainy, he resolved to stay and lie with Mey, the deponent having no other bed for him. The Master of Tarbett ordered his servant to go to his lodgings, and tell that he was not to be at home, and to bring him clean linens next morning.

Andrew Fairbairn deposed, he was with the constables when Mowat was seized; he came not out till the muskets were presented. He said he was an unarmed man, but on searching him they found a drawn sword under his coat. The sword was bloody from hilt to point, and was much bent, and there was blood on Mowat's sleeves. When Mowat heard that a man was killed, he desired to see the body, for what cause the deponent knows not. On seeing it, Mowat said, 'God knows who has 'done it,' and there was no emotion or paleness visible in his countenance. When the Master of Tarbett was carried prisoner before the commandant, he was so apprehensive of bodily harm from the Frenchmen, that a stronger guard was sent for, to protect him from their fury.

Robert Aitcheson saw the prisoner Mowat come out below the forestair when desired, did not hear him say he was an unarmed man, but saw the bloody sword taken from him. The witness supposed the blood to proceed from a wound in his hand.—James Johnston saw the bloody sword taken from Mowat, and imputed the blood to the same cause.

Robert Brown surgeon deposed, he was called by the magistrates of Leith, on the morning after the murder, to inspect the wound. The hole in the coat corresponded with the sword produced;

duced; but as for the wound he could only ſay, that the dimenſion and figure of wounds alter and contract after ten or twelve hours. 1691

The jury, by the mouth of Sir William Kerr chancellor, *found none of the crimes proved.*

Although I am perſuaded that an intelligent jury in theſe days would acquit the priſoners, yet the verdict in thoſe times was very uncommon, and I am by no means certain upon what principle it proceeded. The jury could hardly refuſe a clear aſſent to this propoſition, that it was Mowat who killed Elias Poiret. The maſter of Tarbett was the firſt aggreſſor in the ſcuffle, and his aſſault on George Poiret was ſuch as would have excuſed any *immediate* act of violence with which Poiret could have repelled it. But the ſituation of the Frenchmen, and that of the priſoners, came to be reverſed the moment that they ſallied forth of George Poiret's room, entered the hall, and aſſaulted the priſoners with ſword and piſtol.—As the priſoners were then in actual, and imminent peril of their lives, I apprehend, that, ſuppoſing the killing to be eſtabliſhed in the cleareſt manner, the priſoners were entitled to an acquittal, on the plea of *ſelf-defence.*

John Gilleſpie Merchant in Glaſgow, John Anderſon of Dovehill, and Robert Stevenſon Glazier in Glaſgow, for the murder of Major James Menzies.

THE priſoners were proſecuted at the inſtance of Henry Fletcher, brother to the Laird of Salton, neareſt of kin to the deceaſed, of Lieutenant Colonel Hume, for the intereſt 1694

 of

1694 of his Majeſty's forces, and of his Majeſty's advocate. It was charged in the indictment *, that the priſoners having conceived mortal hatred at the deceaſed, did, on the 19th of October preceding, enter a garden upon the lands of Rainfield, where they underſtood the deceaſed was walking, and upon ſeeing him, they, or one or other of them, did diſcharge guns and piſtols at him, and alſo ſtruck him a blow on the head, which fractured his ſcull, of one or other of which wounds he inſtantly expired.—Or, at leaſt, that they were guilty, *art and part* of this murder.

The defence ſtated for the priſoners was, that, in October laſt, in abſence of the Colonel and Lieutenant Colonel; Lord Lindſay's regiment, then quartered at Glaſgow, was commanded by the deceaſed Major Menzies: That the Major ſummarily apprehended ſeveral inhabitants, burgeſſes of Glaſgow, and kept them in cuſtody of the military on pretence of their being deſerters, but who really were not ſuch: That complaint having been made to the magiſtrates by the perſons confined; they deſired the Major to bring theſe perſons before them, that the complaint might be tried conform to the act of Privy Council, 16th December 1692, but the Major abſolutely refuſed to comply with their deſire. The magiſtrates iſſued a formal edict, requiring him to produce the complainers, but this alſo he treated with the moſt pointed contempt. Proceeding then with the utmoſt gentleneſs, they demanded a conference, to which the Major having conſented, the provoſt, two of the bailies, and Mr Robert Park town-clerk, met with Major Menzies and three Captains of his regiment, in the town-clerk's chamber. The conference began with the provoſt's deſiring of the Major that the priſoners

* Records of Juſticiary, 24th, 27th, 31ſt December 1694. 2d January 1695.

prisoners might be brought before them, and Mr Park, the town-clerk, in a very civil manner, joined in the request. Upon this, an altercation between the Major and the town-clerk took place; the Major gave him bad language, and struck him with a cane, he, the town-clerk, having no weapon in his hand. On this they wrestled, and being separated by the company, and while the town-clerk was held by Captain Jarvais of Lord Lindsay's regiment, the Major drew his sword, and run the town-clerk through the body, of which he died instantly. The Major marched off sword in hand, repaired to the guard-house, ordered his men to charge their muskets, drew them up across the street three file deep, and set them to guard passes in order to favour his escape, mounted horse and fled. 1694

Upon this, Mr Francis Montgomery, one of the Lords of Privy Council, ordered such of the inhabitants as could be soonest got ready, to pursue and apprehend the murderer. In obedience to this order, the prisoners went in pursuit of the Major, came to a garden at Rainfield, where they were informed he skulked. On coming up to him, they charged him with the murder of the town-clerk, and desired him to yield himself prisoner; but this he refused, and opposed them with a drawn sword, upon which he was killed. Various arguments in point of law were also offered for the prisoners, and much casuistry was likewise advanced for the prosecutors. These debates occupy fifty pages folio of the criminal record; but it were superfluous, or improper, to state them here.

The Court sustained the indictment against the prisoners, as relevant to infer the pain of death: But they also sustained this defence as sufficient entirely to cast the indictment, viz. that they pursued the Major by order of a Privy Counsellor, or of the magistrates

1694 giſtrates of Glaſgow, proceeding upon the notoriety of the murder; unleſs the proſecutors ſhould prove that the Major offered to ſurrender himſelf before attacked by the priſoners. This again they ſuſtained relevant to ſet aſide the defence, in reſpect to ſuch of the priſoners only, as did actually kill, or give command to kill the Major; but by no means to infer *art and part* againſt any of the other priſoners, they being *verſantes in licito.*

THE PROOF.

Robert Pollock younger of Milnbourne depoſed, he was at Rainfield on the 19th of October laſt, where he ſaw the three priſoners, but none of them had arms except Dovehill, who had a carabine, but it was not he who killed the Major, for the former was ſtanding with the witneſs at the garden door when they heard the ſhot. Upon going up to the place, they ſaw the Major lying on his back dead, his face bleeding, and a drawn ſword in his hand acroſs his breaſt. Afterwards, when they came to Renfrew, he heard the priſoner, Gilleſpie, acknowledge he ſhot the Major; but the witneſs did not ſee him have any fire arms in his hand, nor did he ſee Gilleſpie either receive from, or return any arms to Dovehill. When Gilleſpie firſt acknowledged that he ſhot the Major, he did not ſpeak of the latter's having made any reſiſtance; but, after he was taken into cuſtody, he declared, that, if he had not done the thing he did, the Major would have run him through the body.

Peter Paterſon, late bailie of Renfrew, went with the three priſoners into the garden of Rainfield the night Major Menzies was killed; is uncertain whether all of the priſoners had arms, only that Dovehill had one or two piſtols. He did not ſee Dovehill

hill give a piſtol to Gilleſpie, but, after the Major was killed, ſaw Gilleſpie deliver a piſtol to Dovehill, ſaying, 'there is your piſtol.' Dovehill and young Milnbourne, a former witneſs, ſtood at the garden door, while the deponent going forward with the two other priſoners, Gilleſpie and Stevenſon, came up with the Major, and one of them ſaid to the deponent, 'Bailie, here is a 'man.' The man called out, 'What is the matter, Sir?' to which the witneſs anſwered, there was a man ſlain in Glaſgow; that the ſlayer was ſuppoſed to be ſkulking hereabout, 'and if you be the 'man, God Almighty forgive you.' The perſon replied, 'it is 'none of your buſineſs.' One of the priſoners then called out, 'Dovehill, here is the man.' The Major cried with an oath, 'What have the raſcals ado with me;' immediately drew his ſword, and advanced upon them in great rage; the deponent and the priſoners retreated; he then heard a ſhot, but knows not whether it came from Gilleſpie or Stevenſon. When he returned, he ſaw the Major lying on his back dead, and his ſword in his hand, lying acroſs his breaſt. 1694

Captain Jarvais of Lord Lindeſay's regiment, a witneſs adduced for the priſoners, was preſent at the conference between the Provoſt of Glaſgow and Major Menzies. He heard the Major called the town-clerk 'a fool, and the clerk anſwered him, 'he was but an 'aſs.' Upon this the Major ſtruck the clerk over the head with his cane, and the clerk returned a very ſevere blow with his fiſt. The company ſeparated them, and the Major drew his ſword, made a thruſt at the clerk, who immediately cried out he was wounded, and clapped his hand on the wound; and, as he was going to another room, the deponent ſaw the clerk fall, and lie on the floor. The witneſs went to the guard houſe, but found the Major was fled. The clerk had no arms.

Simon

1694 Simon Tennent, one of the bailies of Glaſgow, heard the Major call the town-clerk a fool, and the town-clerk call the Major an aſs; ſaw the Major ſtrike the former with his cane. The parties then grappled, and were ſeparated, when the deponent ſaw the glance of a ſword pointed towards the clerk, who immediately cried out, 'a ſurgeon,' and died in about ſeven minutes. He was told by all the company it was the Major who killed the clerk; and the latter, at the time of his death, had no arms, not even a ſtaff, in his hand. James Gemmill, junior, merchant in Glaſgow, on the day Mr Park was killed, ſaw the Major come out of his, the town-clerk's chamber, in haſte, wanting his wig, and his ſword drawn; ſaw him wipe his ſword with the lap of his coat, and return it into its ſcabbard. Before the Major could arrive at the guard-houſe, whither he was going, the deponent heard that the clerk was wounded, and then was told he was dead.

Captain Lindeſay, of Lord Lindeſay's regiment, was preſent at the ſcuffle between Major Menzies and the town-clerk; ſaw the Major's arm in the attitude of puſhing with a ſword; and, immediately after the lounge, the clerk cried he was wounded. The former left the room without his wig; the deponent took up the wig and followed, accompanying the Major to the Gorballs, where he took horſe and fled.

William Napier, provoſt of Glaſgow, was in the town-clerk's chamber the day he was killed. Upon the notoriety of the murder and flight, he gave orders to the three priſoners to purſue and apprehend the Major.—Mr Francis Montgomery, one of the Lords of Privy Council, depoſed, that, on the day of the murder, he was applied to by the Provoſt and Magiſtrates of Glaſgow, to concur with them in ſecuring the peace of the city, which was in

in an uproar. The deponent went to the town-clerk's chamber, 1694
whoſe dead body he found lying on the floor, and every body crying that Major Menzies was the murderer. The deponent concurred with the Magiſtrates, in ordering Dovehill, then in the room, to take ſome of the honeſt town's-folk along with him, and to purſue and apprehend the murderer; upon which the people diſperſed peaceably.

The jury unanimouſly found the indictment not proved; found the priſoners defence in terms of the interlocutor proved; and found it not proved that the Major offered to ſurrender himſelf; upon which the priſoners were diſmiſſed from the bar.—They had little regard for the Major's memory who raiſed ſo abſurd a proſecution.

George Cumming Writer in Edinburgh, for the Murder of Patrick Falconer, Soldier in Lord Lindeſay's Regiment.

THE indictment ſet forth, that the priſoner, being upon the 1695
ſtreet of Portſburgh, a ſuburb of Edinburgh, on the 5th of the preceding month of September, between nine and ten at night, the deceaſed Patrick Falconer, and other two ſoldiers of Lord Lindeſay's regiment, walked peaceably by him in the way to their quarters; when the priſoner gave the ſoldiers opprobrious language, and, without any juſt provocation, drew his ſword, with which he maliciouſly run the deceaſed through the body, of which he died within twenty-four hours.

1695 The parties were pretty much agreed as to the facts which gave rise to this prosecution: That the prisoner, entertaining a notion that the soldiers had made a rude answer to his companions, who inquired of them what o'clock it was, gave the soldiers abusive language, upon which they went up to him, and attacked him with their drawn bayonets *: That the prisoner received them with a drawn sword, and, after some skirmishing, killed the deceased.

Defences were made by the prisoner's counsel, and answers by the public prosecutor; but as, in a subsequent trial †, I shall have occasion to treat as fully as the nature of this work will admit, of the distinction between murder and manslaughter by the law of Scotland, of culpable and casual homicide, of killing upon provocation, or in self-defence, I shall here state only the heads of the defences, and answers that were made in the course of this trial.—It was alledged for the prisoner, *1mo*, That he entertained no malice prepense against the deceased; and that this was but an accidental rencounter; *2do*, That he killed the deceased in self-defence; *3tio*, Whereas, it was argued, that, when the deceased and his fellow soldiers advanced upon the prisoner with drawn bayonets, he should not have received them with a drawn sword, but should have endeavoured to appease their fury, or should have fled; it was answered, that argument and entreaty were very unequal weapons to contend with pointed steel; and that there was no obligation on the prisoner to fly.—It was replied by his Majesty's Advocate, that there was no necessity for charging the murder to have been premeditated; for manslaughter, in the eye of the law, did in itself imply guile and malice, unless

* Rec. of Just. 11th, 18th, 20th, 21st, Nov. 1695.

† Trial of Carnegie of Finhaven, for the murder of the Earl of Strathmore.

unlefs the contrary was proved. *2do*, That the plea of felf-defence was only competent to him who fuftained a wanton attack, not to one who, by provoking language, had drawn the attack upon himfelf: That the prifoner was the caufe of the quarrel, had given rife to the injury, and was thereby debarred from pleading felf-defence againft an affault inftigated by his own infolence. 1695

THE PROOF.

James Porteous, apothecary in Edinburgh, depofed, that, in the beginning of September laft, he was one evening in the ftreet of Portfburgh, between nine and ten o'clock, in company with three other perfons, of whom the prifoner was one. The prifoner went to a houfe to call for his cloak, and the deceafed, with two other foldiers, came up with the deponent and his companions, who afked at them 'what o'clock it was?' He cannot be pofitive what anfwer they made; but the prifoner, who was a little way behind them, called the foldiers fons of whores and fons of bitches. The foldiers afked what he faid, and he repeated the words, calling, at the fame time, to his companions to beat the foldiers. The foldiers then drew their bayonets, paffed by the deponent and his companions, and went up to the prifoner, who advanced to them, and, when he was within fword's length of them, drew it; and, within a quarter of an hour, the deponent heard one cry, Murder! That fame evening he called at the prifoner's lodging, whom he found in deep concern, declaring he had given the foldier a ftab, and he was afraid it would prove mortal: At the fame time he drew his fword, and fpit upon it, endeavouring to wipe the blood off it. The prifoner came next morning to the deponent's chamber,

 told

1695 told him he had been at Lauriefton, and there was very bad news; the foldier was dead.

John Hall writer in Edinburgh was returning from the country one evening in the beginning of September, with the prifoner and other two comrades. When they came nigh the Weft Port, the prifoner went to a houfe for his cloak. In the mean time three foldiers came up with the deponent and his companions. He cannot be fure what anfwer the foldiers made, when afked what o'clock it was; but the prifoner called out to them, 'Ye fons of whores, what anfwer is that to give to gentlemen?' On this the foldiers drew their bayonets, paffed the witnefs, and went up to the prifoner. In a little he heard the clafhing and faw the glancing of fwords; upon which he went up to the combatants, and relieved the prifoner of one of the foldiers with whom he was engaged; and, very foon after, he heard one cry Murder! He then went off; and, in his way, he called at the houfe of one Widow Lindefay, who told him that the prifoner had been there with his fword drawn, and had left word, that he had gone home, whither the witnefs followed him. He found him fitting penfive and exceeding forrowful, expreffing his fears that the foldier had got a mortal wound. The deponent faw blood on his fword, went with him next day to Lauriefton, and, when they heard that the foldier was dead, the prifoner clapped his hand on his thigh, and was greatly agitated.

Two furgeons fwore, that, upon being called to the deceafed, they found him run through the body with a fmall fword; that the wound was mortal, and he died of it next day.

The jury returned this verdict: 'They, all in one voice, find 'proven, that fome words falling out between George Cum-

'ming

'ming the *pannel* * and three soldiers, in the West Port, in the 1695
'month of September last, *the soldiers drew their bayonets, and*
'*advanced to the said George, who, when the soldiers were within the length of his sword, drew the same, and, defending himself, Patrick Falconer, one of the three soldiers, was killed*; 'whereby the assize finds the pannel guilty of manslaughter.' The Court sentenced *THE PRISONER TO BE HANGED, AND HIS PERSONAL ESTATE TO BE FORFEITED.*

To condemn an innocent man to death, by the sentence, and forms of law, has ever been looked upon as one of the greatest moral evils. From the general aversion of mankind to inflict undeservedly the pain, and, what is infinitely worse, the ignominy of a public death, I hope it is a case which has rarely happened, except through the bloody ministers of clerical superstition, and imperial power; the last of which makes a sport of life and liberty; while the first claims a still wider dominion, over life, liberty, and understanding; over liberty not only of *action*, but of *thought*.

To maintain that there is no difference, in the degree of moral turpitude, between a deliberate murder, and a rencounter originating from sudden provocation and terminating in death, is to contradict the perceptions of the understanding, and the feelings of the heart: And it does not appear that, in this article, the old law of Scotland was repugnant to our judgment or our feelings. The absurd proposition, that there is no distinction between murder and manslaughter, between deliberate assassination and killing of a suddenty, appears to be of no older date than the Restoration. At that period our courts of law became

* Prisoner.

1695 came highly tyrannical; and those which possessed a criminal jurisdiction displayed what, indeed, was no novelty in this country, a very sanguinary spirit. A celebrated lawyer *, who scrupled not to sacrifice abilities and principle at the shrine of despotism, has left a specimen of his attempt entirely to set aside trial † by jury. The mode of proceedings in our criminal courts, in the tyrannical and turbulent reign of Charles II. by the address of the King's counsel, underwent a material innovation. In our records previous to this aera, juries are found to have returned a general verdict of *guilty*, or *not guilty*; the words of stile were, '*fylit culpable and convict*,' or, '*clean and acquit*.' But, after the Restoration, prosecutions became so frequent against rebels, covenanters, and attendants upon conventicles, that it was matter of difficulty to get a jury to find a verdict against a state criminal, particularly an attendant upon conventicles. His Majesty's Advocate, to evade this reluctance, fell upon a device which almost totally annihilated the powers and purposes of a jury. It was, to introduce a doctrine, that, in no case whatever, the jury had a right to exercise their judgment upon any point, except the evidence relating to the different facts charged in the indictment: That, in every case, they were to decide merely upon the fact; and that it was the province of the judges to determine the import of their verdict, in the scale of guilt, from a capital crime down to pure innocence: That, therefore, it was the business of the jury not to find *guilty* or *not guilty*, but *proved*, or *not proved*; and to apply such findings to the different charges, trifling or important, exhibited in the indictment.

The

* Sir George Mackenzie. Arnot's Hist. of Edinburgh, p. 149. † Mackenzie's Criminals, tit. *Assizers*.

The lawyers for the Crown devifed another expedient which 1695 degraded jurymen from the *palladium* of liberty, to a fenfelefs inftrument of tyranny; an expedient which vefted the power of convicting in the judges, when the jury doubted not only of the *criminality of the fact*, but even of the *fact itfelf*. For this purpofe they drew up their indictments very circumftantially, not only ftating the crime, but alfo the minute facts, trifling or important, from which they inferred the prifoners guilt; and, upon thefe indictments, the Court ufed to pronounce an interlocutor, finding either the crime in general, or the facts and circumftances fpecially libelled, relevant to infer the pains of law. When it was fufpected that a jury would fcruple to find a crime in general proved, they were required to return a *fpecial verdict*. Accordingly, they were often weak enough to return a verdict finding proved a long chain of circumftances fpecified in the indictment, leaving it entirely in the breaft of the judges to determine whether thefe circumftances did eftablifh the fact libelled.

Thus, in the trial of Robert Carmichael fchoolmafter, for the murder of one of his fcholars, a fon of Douglas of Dornock, it was proved that the boy was in perfect health at two in the afternoon, when he went to fchool, and that before three he was carried out of it dead. It was found by the jury that the prifoner did three times fucceffively make the deceafed be held up, and feverely lafhed him on the back and hips, 'and in rage and 'fury, did drag him from his defk, and did beat him with his 'hand upon the head and back, with heavy and fore ftrokes; 'and after he was out of his hands he immediately died.' That, after the boy's death, the fide of his head was fwelled, and there were livid marks on it; and the mark of many ftripes on his back and thighs.—Although thefe circumftances, as well as

1695 a rattling noise in his breast upon the third beating, and a good quantity of blood being found under his body after death, (which had issued from the stripes on his back), afford complete conviction* that he died of the beating; yet the lenity of the Court in this instance seemed to increase with the barbarity of the criminal, for they only sentenced him—*to receive seven stripes, and to be banished Scotland for life* †.

It is obvious, that, from the moment these iniquitous doctrines were acquiesced in, the *palladium of liberty* was gone. *Facts* might be charged, of which the guilt, or degree of guilt, depended solely upon the *intention* which directed them. A fact might be indisputable; yet the intention of the accused might be justifiable, or at least might not amount to the degree of criminality charged in the indictment; yet by this doctrine the jury would be mere cyphers, the Court alone would decide.—Facts of the most criminal nature, circumstances trifling or indifferent, might be blended in one indictment; and, in such case, a *special verdict* would leave the prisoner at the mercy of the Court, which it is the grand purpose of trial by jury to prevent.—I have discovered an instance of the Court's actually taking advantage of a circumstance of this sort. In the trial of Captain Douglas, and two other men, for committing a rape on Christian Davidson ‡, the jury found 'the violent ravishing Christian Davidson, '*or being art and part thereof, not proven*.' But found, that, on the night libelled, Captain Douglass left, for three quarters of an hour, a company with which he was drinking; and that, on his return, he told the company, when challenged for his absence, *ut*

* The body of the deceased was not opened. † Records of Justiciary, January 15. 16. 19. 1700. ‡ Ibid. 8. 22. 23. Feb. 1697.

ut virginem deflorasset, and showed his knee dirtied with mud. 1695
—The Court fined him in 300 merks.——There is another case in which the jury made an absolute surrender of their privileges. In the trial of Marion Lawson for child-murder, they found the prisoner *not guilty*, *in respect of no probation* *; but, in respect of the *presumptions*, *remit the prisoner to the consideration of the Court*.—The Court sentenced her to be whipped and banished.

In this case of Cumming, there were no circumstances to entitle the Court to pronounce upon the prisoner the *poena ordinaria*, the ordinary penalty of murder. The verdict of the jury set forth, that some words fell out between the prisoner and the soldiers; but did not find who gave rise to the verbal injury. But, supposing the opprobrious expressions used by the prisoner to have proceeded from mere wantonness, I apprehend it did not entitle three men, with drawn swords or bayonets, to assault one. And it cannot be maintained, without the height of absurdity, that this one, even after having used insolent language, was to stand tamely and have his throat cut for his impertinence. The jury found that the prisoner, *in defending himself, killed the deceased:* The Court condemned the prisoner*; therefore, the Court condemned a man to be hanged for defending himself.* The same judges who sat on this trial † pronounced the dreadful doom on the youth, who atoned with his blood, for entertaining, on religious matters, opinions dissonant from those of the times.

How juries came to recover their dignity and importance, will be seen in the subsequent trial of Carnegie of Finhaven.

* Rec. of Just. 1st Aug. 1662.

† With the exception of James Falconer, Lord Phesdo, who sat not on the trial of Aikenhead. See *infra* Blasphemy, Aikenhead.

*James Carnegie of Finhaven, for the Murder of Charles Earl of Strathmore *.*

Counsel for the Prosecutors, Duncan Forbess of Culloden, Esq; his Majesty's Advocate, &c.

Counsel for the Prisoner, Robert Dundas of Arniston, Esq; &c. &c.

1728 THE prisoner was prosecuted at the instance of Susanna Countess of Strathmore, relict of the deceased, of the Honourable James Lyon his brother, and nearest lawful heir, and of his Majesty's advocate, for the murder of the Earl of Strathmore. It was charged against the prisoner in the indictment †, that, having a causeless ill-will at the deceased Earl of Strathmore, and conceiving deadly malice against him, he, on the 9th day of May preceding, between the hours of eight and nine at night, without the least provocation then given by the Earl, did assault him with a drawn sword, and feloniously murder him, by giving him a thrust with the sword into the belly, and through the intestines, till it came out at his back, whereof he died on the Saturday after; or, at least, that he was guilty art and part of murder, or manslaughter, or one or other of them.

Long, learned, and ingenious pleadings were made on the conclusion of the indictment; the counsel for the pursuers maintaining, that it inferred the pains of death; and those for the prisoner contending, that it inferred but an arbitrary punishment. The Court appointed informations in writing to be lodged on both sides.

Substance

* Records of Justiciary, 10th July, 1st, 2d, 3d, August 1728.

† This case is published at large in the State Trials, vol. 9. p. 26. It occupies 35 pages folio. It is also published separately in 131 pages octavo.

Substance of the Pursuer's Information. 1728

The information for the pursuer relates to the defences stated, *viva voce*, for the prisoner, and its purpose is to obviate them. It is there contended, that, by the Mosaick law, 'whoso shed-'deth man's blood, by man shall his blood be shed:' That the benefit of the cities of refuge was only granted where the killing was merely accidental, since it was declared, that 'he who 'smites with a throwing stone, or with a hand-weapon of wood 'wherewith a person may die, and he dies, the murderer is sure-'ly to be put to death:' Although the argument is conclusive, that wherever, by the law of Moses, capital punishments are allowed, such punishments are lawful; it is not equally clear, that in those cases where the powers of the law are suspended by the *ius asyli*, afforded in the cities of refuge, which was established by positive precept, that, in similar cases, in countries where no such privilege is allowed, no such precept established, the punishment should not be capital.

That, by the civil law, slaughter, in an affray, was punishable by death, from which neither passion nor provocation exempted, which is clear from it being stated to the Emperor, whether a husband, who, urged by the vehemence of his grief, should kill his wife caught in adultery, be punishable as a murderer, a case which could not have needed a reference, if passion and provocation had mitigated the punishment.

There next follows an elaborate and very lame argument, to prove, that, by the old statute law of Scotland, little distinction was made between *premeditated murder*, *culpable homicide* *, *and man-*

* I embrace with great satisfaction this opportunity to mention, that the Court of Justiciary has now solemnly repudiated this absurd and iniquitous doctrine. In the libel at the instance of John and William Stewarts, against Lieutenant George Storey,

1728 *manslaughter*. It is argued, that, by the practice of our criminal Courts, still less distinction is made between these degrees of guilt. Indeed, that, to make any distinction at all, is directly repugnant to act 22d Charles II. A. D. 1661, and to the uniform decisions of the Court of Justiciary from that period to the present. And a variety of criminal cases in support of this doctrine are adduced, which confirm it in a wide latitude of absurdity and cruelty.—From all these, the following conclusion is drawn: 'That neither the drunkenness of the pannel, (*i. e.* prisoner) nor provocation given him, nor the suddenty upon 'which the fact was committed, can afford a defence to the pannel to exculpate the slaughter, or lessen the ordinary punishment.'

That the only defence urged for the prisoner which was at all plausible, was, that intending to kill one man, he had killed another; instead of Lyon of Bridgetown, against whom the blow was directed, he had killed the Earl of Strathmore. On this branch of the argument, the information justly concluded on the authority of the civil law, and of common sense, that, if the intention be murder, it makes not the least difference that another person than he at whom it was directed shall receive the mortal blow.

It is next contended, that, by the law of England, killing of a suddenty, in many cases, is deemed murder; that, in such cases, malice prepense is often presumed; and that the facts, as stated by

Storey, for the murder of William Stewart surgeon in Paisley, the jury, *conform to the recommendation of the court*, returned the following verdict: 'All in one voice 'find the pannel, George Storey, *not guilty of the murder* libelled; but, at the same 'time, find him *guilty of culpable homicide*.'—The Court sentenced the prisoner, Storey, to pay 1000 merks of *assythement*, i. e. *solatium*, damages, to the private prosecutor, and to undergo eight months imprisonment; Records of Justiciary, January 24. 25. 29. 1785.

by the prisoner, would be sufficient warrant for a verdict of murder by the law and practice of England. 1728

Substance of the Information for the Prisoner.

It sets out with the declaration made by the prisoner at the bar, when asked by the Lords if *guilty or not?* in these words: 'My Lords. I find myself accused by this indictment of maliciously murdering the Earl of Strathmore; but, as to any ill-will, malice, or design to hurt the Earl, God is my witness I had none: On the contrary, I had all the due regard, respect, and kindness, for his Lordship, that I ever had for any man. I had the misfortune that day to be mortally drunk, for which I beg God's pardon; so that, as I must answer at God's great tribunal, I do not remember what happened after I got the affront your Lordships will hear of from my lawyers. One thing I am sure of, if it shall appear that I was the unlucky person who wounded the Earl, I protest before God, I would much rather that a sword had been sheathed in my own bowels. And, further, I declare, that I do not so much as remember that I saw the Earl after I came out of the kennel, and even not so much as the drawing of my sword; and, therefore, I cannot acknowledge the libel as it is libelled.'

The facts are then stated which gave rise to this trial, viz. that, on Thursday the 9th of May, the Earl of Strathmore, the prisoner, and others, dined at the house of a gentleman, whose daughter's funeral they had been invited to witness, and drank pretty freely: That, after the funeral, they went to a tavern in Forfar, where they again drank plentifully, and the prisoner was much overtaken with liquor, and Mr Lyon of Bridgeton treated the prisoner with insulting and impertinent language: That the Earl of Strathmore went to visit the Lady Auchter-house, a sister of the

1728 the priſoner's, who accompanied his Lordſhip. Bridgeton followed them, renewed his impertinent language, preſcribed to the priſoner how he ſhould diſpoſe of his daughters in marriage, and ſettle his eſtate, having no ſons; upbraided him with being in debt; inſulted the Lady in whoſe houſe they were, griping her arm rudely, ſo that Lord Strathmore thought proper to break off the viſit. The priſoner and Bridgeton followed the Earl, and, when they came to the ſtreet, ſome words paſſed; and Bridgeton, ſpeaking of the priſoner, ſaid, '*God damn him*,' then took him by the breaſt, and puſhed him over head and ears into a dirty kennel two feet deep, where, in his drunken condition, he might have been ſuffocated, had not a ſervant of the Earl's helped him out, which ſervant expreſſed, at the ſame time, his indignation at Bridgeton in theſe words, '*Sir, though you be a gentleman, you* '*are uncivil*:' That Bridgeton walked off, turned about to the priſoner, and folding his arms acroſs his breaſt, laughed him to ſcorn. The priſoner then, being recovered out of the kennel, drew his ſword, and with a ſtaggering pace advanced to Bridgeton, and made a puſh at him, when the Earl haſtily turning about, and puſhing Bridgeton aſide, received the fatal wound.

From this ſtate of facts, the counſel for the priſoner propoſed this defence, 1*mo*, That killing is not murder, unleſs forethought malice againſt the perſon killed be either proved or preſumed: That neither of theſe was the preſent caſe, for no antecedent malice was charged againſt the priſoner in the indictment, ſo could not be *proved*, and the circumſtances of the fact excluded malice from being *preſumed*; for it was charged that the puſh was aimed at Bridgeton, not at the deceaſed; conſequently no malice could be preſumed to be entertained by the priſoner, towards a perſon againſt whom the blow was not directed. 2*do*, That the priſoner could not be more guilty in killing the Earl of Strathmore, by the thruſt directed at Bridgeton, than in killing

Bridgeton

Bridgeton himſelf; yet ſuch was the provocation given by him to the priſoner, that had Bridgeton been killed, 'it would have 'been conſtructed only as caſual, or culpable homicide.' 1728

It was then contended for the priſoner, that killing in ſuch circumſtances was not capital by the divine law. The divine law was branched into two parts, the law of nature, and the law of Moſes. By the law of nature, it was argued, every action muſt be conſtrued according to the intention of the actor; and that the deed of a man, if not proceeding from his will, was not different in point of merit or demerit, from the act of an irrational creature, or from an effect produced by inanimate matter: That the priſoner obviouſly had no intention to kill the Earl of Strathmore, conſequently he could have no criminality in having occaſioned his death.—According to the Moſaick law, it was contended in a very prolix argument, that it was immaterial whether the mode of exempting from puniſhment be in form of abſolving from trial, or of flying into a city of refuge, or other ſanctuary; and that, by the law of Moſes, the benefit of a city of refuge was hardly neceſſary in ſuch a caſe as the priſoner's. By this law, the cities of refuge were appointed as an aſylum to ſuch as had killed a man without malice prepenſe, or, in the language of ſcripture, without hating him in time paſt, *i. e.* a hatred of three days ſtanding. But that the *act* of killing *one*, when the *purpoſe* was to kill *another*, was a caſe not ſtated in holy writ.

Upon the *civil* or *common* law, various poſitions were maintained, 1*mo*, That culpable homicide was not capitally puniſhed; 2*do*, That homicide committed upon ſuch high provocation as was here given by Bridgeton to the priſoner, would, by that celebrated ſyſtem, have been deemed only culpable homicide; 3*tio*, That the priſoner's intention to kill not being pointed at the

1728 the Earl of Strathmore, but the aſſault, of whatever nature, being directed againſt another, the death of the Earl occaſioned by ſuch aſſault could amount only to caſual, or at moſt culpable homicide.

The counſel for the priſoner then ſucceſsfully maintains, that, by the old ſtatute law of Scotland, and particularly by James I. Parliament 3d, act 51. diſtinction is made between premeditated murder and killing of a ſuddenty upon provocation, in the latter of which caſes, the benefit of the ſanctuary, which the church had obviouſly founded upon the aſylum of the cities of refuge, was allowed to the manſlayer. And if, with the abolition of Popery, the privilege of the ſanctuary was alſo abrogated, that to alter thereby, and to aggravate the civil puniſhment of crimes, muſt either have proceeded from an omiſſion of the legiſlature, or the over great zeal of the times.

An ingenious but more doubtful argument follows to ſhow, that, by the act Charles II. Parliament 1. c. 22. 'for removing 'of all queſtion and doubt that may hereafter ariſe in criminal 'purſuits for ſlaughter,' the *caſual* homicide which was thereby declared to be exempted from capital puniſhment, did truly imply ſlaughter *not merely accidental*, but that which was *in ſome degree culpable*. It muſt indeed be confeſſed, that, conſidering the infinite importance of this ſtatute to our lives and ſafeties, it is expreſſed in a ſcandalous degree of inaccuracy, obſcurity, or abſurdity; and that, with the reſt of our penal laws, it requires a reviſal and explanation.

The information next endeavours to obviate the caſes in point adduced by the purſuer, to prove that no diſtinction was made by the Court between murder and manſlaughter: And ſtates on the

the other hand certain decisions to show, that a capital punishment was not applied in some cases which were '*neither merely* '*casual nor in self-defence*.' 1728

Finally, it is maintained on behalf of the prisoner, 'that 'man-slaughter is *in effect* not punishable at all in England,' and that culpable homicide only inferred an arbitrary punishment.

The Lords pronounced the following judgment:—'Find, That 'the pannel having, *by premeditation and forethought felony*, 'with a sword or other mortal weapon, wounded the deceased 'Charles Earl of Strathmore, of which wound, he the said Earl 'soon thereafter died; or, that he the pannel was art and part 'thereof, relevant to infer the pains of law; but allow the pan- 'nel to prove all facts and circumstances he can, for taking off 'the aggravating circumstances of forethought and premedita- 'tion: Also find, that the pannel, time and place foresaid, *ha-* '*ving, with a sword or other weapon, wounded the said Earl,* '*of which wound his Lordship soon died, or that the pannel was* '*art and part thereof, separatim relevant to infer the pains of* '*law; and repel the defences proposed for the pannel*; and re- 'mit him and *the indictment, as found relevant*, to the know- 'ledge of an assize.'

THE PROOF.

John Ferrier * deposed, that, at the time and place libelled, he heard Bridgeton ask the prisoner if he would give his daughter

A a to

* The first witness who was examined in this cause, was Robert Hepburn smith in Forfar. So little regard did the Court pay to the rules of law in receiving of evidence;

1728 to Lord Rosehill? to which he answered, No. Bridgeton then asked him if he would drink a bottle of wine, and drink *the King's* health? and upon the prisoner's refusing, Bridgeton took hold of him by the breast, and violently pushed him into the kennel, saying, 'Go and be damned, and your King George 'whom you love so well.' The kennel was deep and dirty, the prisoner was immersed into it, but not entirely covered; his face, however, when he came out of it, was almost as black as his coat. He was helped out of the gutter by a servant of Lord Strathmore's. Whenever he got upon the street, he drew his sword and run towards Bridgeton, who, upon seeing this, laid hold of Lord Strathmore's sword and endeavoured to pull it out. Lord Strathmore then turning about, pushed off Bridgeton, at whom in the mean time the prisoner made a thrust with his sword; Lord Strathmore at that instant was pushing Bridgeton aside and advancing to the prisoner, and the prisoner staggering forward, followed the thrust upon Lord Strathmore; then the company became so intermixed, that the deponent did not see where the thrust landed. Soon after he saw Mr Thomas Lyon, his Lordship's brother, with his sword beat the prisoner's sword out of his hand, who run off staggering towards the Lady Auchterhouse's lodging, and had almost fallen before he got in at the gate, and about the same time the deponent saw the Earl fall down upon the street, and afterwards carried off.

William Douglass saw the prisoner falling backwards into a kennel, while nobody was near him but Bridgeton. When he got

evidence; so much did they seem bent against the prisoner, that they admitted this man a witness, although it was objected to him, and the objection clearly proved in Court, that, since his citation to be a witness, he said, '*That he thanked 'God he now had an opportunity to hang him, (the prisoner), and would do it if he could.*'

got out of it, he drew his ſword and approached to the groupe, of which Lord Strathmore and Bridgeton were part. At this time Bridgeton was ſtanding between the Earl and the priſoner, 'but all of a ſudden and a clap, the Earl came to be interpoſed 'between Bridgeton and the pannel;' and at this time the priſoner was within ſword's length of the place where Bridgeton had been ſtanding. The deponent ſaw the priſoner make a thruſt with his ſword, and the Earl was then ſtanding next the priſoner with his face towards him. His Lordſhip received a wound in his belly, and when he was carried into a houſe and dreſſed, the deponent heard him ſay, that, after the ſword entered his belly, the priſoner gave it a ſecond thruſt. 1728

James Barrie, ſervant to the priſoner, ſaw his maſter and Bridgeton converſing together, but did not well hear what his maſter ſaid. Bridgeton looked and ſpoke angrily, and with both his hands puſhed his maſter into the gutter, who fell upon his back, and was covered near over the belly. The deponent inſtantly quitted his horſes and ran to his maſter's relief; but a ſervant of Lord Strathmore's helped him out before he came up. The priſoner then drew his ſword, and with his face all beſpattered with dirt, and the mire running out at the top of his boots, went pretty faſt forward, ſtaggering and ſaying, 'this can not 'be ſuffered.' On coming up to the Company, he made a puſh at Bridgeton, who ere this had attempted to draw Lord Strathmore's ſword; and, 'when his maſter made the puſh, he ſeemed as if he had been falling, and ſaw him cloſe upon Lord 'Strathmore.' But his Lordſhip had put Bridgeton aſide, and advanced half a ſtep towards the priſoner, and, after this, they were ſo intermingled in a crowd that the deponent did not ſee what paſſed; only he ſaw his maſter's ſword ſtruck out of his hand by another ſword, who thereupon withdrew to his ſiſter's

1728 lodging. Depofed, that his mafter was very drunk: That, about a month before, he heard the Earl invite the prifoner to his houfe, and the invitation was accepted; and, about eight days before this unlucky accident, the prifoner bid the deponent defire the taylor to get his clothes ready, for he intended to wait upon his Lordfhip at Glammifs, as foon as he had got his chaife home.

Margaret Carnegie, a witnefs cited for the prifoner, whofe fifter fhe was, depofed, that, on the afternoon of the day libelled, Lord Strathmore, Bridgeton, and the prifoner, paid her a vifit. She obferved no fort of difference between his Lordfhip and the prifoner; on the contrary, the latter, and the reft of the company, drank Lady Strathmore's health twice, and the prifoner toffed up his glafs. Depofed, that Bridgeton was very rude to the prifoner, feized the deponent by the wrift, 'fqueezed it hard, 'and faid it would be no difficulty to break it.' At the fame time he took the prifoner by the arm, ftruck his hand down to the table, and faid, 'Will ye not agree to give one of your 'daughters to Rofehill*?' and fhook his hand over him.

Three witneffes fwore, that, about two years ago, there had been fome mifunderftanding between the deceafed Earl and the prifoner; but that they never heard him exprefs a grudge or refentment againft his Lordfhip. And a variety of witneffes depofed, that, on feveral recent occafions, they had heard the prifoner exprefs great refpect for the Earl; had feen nothing but mutual civilities paffing between them; and that the prifoner was a good tempered man, nowife quarrelfome.

David

* Lord Rofehill, eldeft fon to the Earl of Northefk.

David Cauty, bailie of Forfar, depofed, that, on the night libelled, when he vifited Finhaven in prifon, he found him 'crying to a great extremity, as if he had been diftracted, faying, it 'was the greateft misfortune that could happen him, and that he 'deferved to be hanged for wounding fuch a worthy Earl.' Depofed, that the prifoner was drunk; but regretted his misfortune as if he had been fober; and that, he faid, his defign was againft Bridgeton. 1728

Two phyficians and two furgeons fwore, that Lord Strathmore died of the wound about forty-nine hours after receiving it. Two of them depofed, that his Lordfhip told them he did not believe the prifoner intended the wound for him; yet there was one circumftance he could not account for, viz. that, after the fword 'had entered his body, Finhaven preffed it forward 'till their bodies were clofe together.

The Prifoner's Counfel change their ground.

The defence hitherto propofed for the prifoner was, that the circumftances of the cafe confidered, he was not guilty of murder, but of manflaughter. The Court over-ruled the defence; for they *found, that the prifoner having, time and place forefaid, wounded the faid Earl, of which wound his Lordfhip died, feparatim relevant to infer the pains of law, and repelled the defences propofed.* Now the killing was indifputable; therefore, if fome other mode of defence was not adopted, the prifoner was gone.

Happily for the prifoner, and happily for the country, his counfel poffeffed fpirit and abilities equal to the important tafk. Sprung of a family that feems to give to its defcendants an hereditary title to great talents, he had the twofold merit of faving his

1728 his client, and wrenching the rights of jurymen from the grasp of tyranny.

He repeated and enforced to the jury the arguments stated to the Court, to show that the excessive provocation the prisoner had received, the suddenty of the fact, and the certainty of his having entertained no design to harm the Earl of Strathmore, rendered him excusable in having been the cause of his Lordship's death.—He told them with a manly confidence, which conscious right inspired, that they must not be startled at the interlocutor of the Court. He unfolded the purpose and powers of a jury, which was simply, that no person should be subjected to a criminal sentence unless convicted by his peers; and that a jury which *convicted, without being satisfied of the prisoner's guilt*, were themselves guilty of treachery and murder. He explained how the King's counsel, in the reigns of the royal brothers, by a mixture of imperious dictate, and sophistical argument, wrenched from weak jurymen, trembling under the rod of power, the privileges vested in them by the constitution: And the acrimony of his remark on those tools of despotism who undermined the privileges of assize, was in part directed at those timid jurymen who had afforded the repeated precedents which were now grounded upon, as forming a change in the law itself. He told them, that, by the stile of verdicts which had lately crept in, a jury by finding *proved*, instead of *guilty*, or *not guilty*, might surrender into the hands of the Court, perhaps also of the executioner, the life of a fellow citizen, who they were convinced had killed the deceased in self-defence: And, in the most pathetic language, he deplored the fate of *Cumming*, who suffered by the hands of the executioner for a deed which the *jury found had been done in self-defence*. He maintained, that the judges, by finding *the killing at the time libelled relevant*, had manifested their

their opinion upon the point at iſſue, had teſtified their resolution, to condemn the priſoner, unleſs the jury ſhould pronounce a verdict putting it out of their power: That the only object for their deliberation was, whether, in their own mind, the priſoner had committed *murder*, or whether his guilt was diminiſhed or annihilated by the circumſtances of the caſe.—He inſiſted, that this was the critical moment which was either to rivet the prerogative of the Court over the privileges of a jury, or to emancipate them from the ſubordination and inſignificance into which they had been degraded by a government, which finally was overturned on account of its reiterated attempts to overthrow every ſpecies of liberty civil and religious: And that the liberties of their country, the blood of the innocent, and their future peace of mind, depended upon the degree of juſtice and reſolution which they ſhould diſplay in the verdict they were about to pronounce *. 1728

The jury, by plurality of voices †, found the priſoner *NOT GUILTY.*

James

* The late Lord Arniſton, counſel for the priſoner, ſeldom prepared notes for his pleadings. Thoſe which he made out in this cauſe are preſerved; they are extremely ſhort, conſiſting of but a few ſentences, containing the heads of his argument. The ſubſtance, however, of his ſpeech to the jury in defence of the priſoner, is in ſome meaſure extant in the memory of his ſon, the Lord Preſident, who has honoured me with the moſt uſeful and obliging communications in the courſe of this work.

† The jury divided twelve to three. The following perſons found *not guilty:* Sir Robert Dickſon of Invereſk, chancellor of the jury, George Loch of Drylaw, Walter Riddel of Granton, George Warrander of Bruntsfield, Thomas Brown of Bonnington, James Balfour of Pilrig, Robert Dundas, David Inglis, David Baird, Alexander Blackwood, and John Steven, merchants, and James Kerr goldſmith Edinburgh. The three who diſſented, and proteſted againſt the verdict, were, John Watſon of Muirhouſe, George Haliburton of Fordel, clerk to the jury, and John Couts merchant Edinburgh.

James Stewart in Aucharn for the Murder of Colin Campbell of Glenure.

1752 THE prisoner was natural brother to Mr Stewart of Ardsheil, whose estate was forfeited on account of his being engaged in the late rebellion. He was brought to trial before the Circuit Court of Justiciary at Inverary, upon the 21st of September 1752, for the murder of Colin Campbell of Glenure, factor appointed by the Barons of Exchequer upon the forfeited estate of Ardsheil. The murder was perpetrated upon Thursday the 14th of May preceding. Mr Stewart was apprehended upon Saturday the 16th, committed prisoner to Fort-William, and kept there till the day of his trial in such rigorous confinement, that his friends, his wife, and children, his agents, and counsel, were for the most part denied access to him. In the precognition that was taken concerning Glenure's murder, the prisoner's wife and children, contrary to the dictates of humanity, and rules of law, were repeatedly examined, upon oath, on every circumstance relative to the murder alledged to have been perpetrated by their husband and father, and their depositions were adduced in evidence against him when he stood trial for his life. Archibald Duke of Argyle, Lord Justice General, with the Lords Elchies and Kilkerran, sat as judges: And in this case alone did a Lord Justice General, and a Lord Advocate, ever make their appearance at a circuit.

The indictment, which is very long, was raised at the instance of Mr Grant of Prestongrange, his Majesty's Advocate, and of the widow and children of the deceased. Both the prisoner and Allan

Allan Breck Stewart were charged in it as guilty of the murder; 1752 Allan Breck as the actual murderer, and the prisoner as being *art and part*, or an accomplice. The former not appearing, sentence of outlawry was pronounced against him; the trial went on against the latter.—The indictment endeavoured, by a very long chain of circumstances, to fix down the guilt upon the prisoner. It set forth his having conceived a resentment against the deceased on account of his having, in quality of factor upon the forfeited estate of Ardsheil, turned the prisoner and other tenants out of their possessions: That the prisoner, in repeated expressions, threatened vengeance against the deceased: That he conspired to murder him; and instigated Allan Breck Stewart, a man of desperate fortune, to this bloody enterprise: That Allan Breck did accordingly waylay the deceased, and murder him in the wood of Lettermore, in the afternoon of Thursday the 14th of May last, by shooting him through the body, so that he died upon the spot: That Allan Breck immediately absconded; and that the prisoner applied to his friends, and procured a little money, which he sent to Allan Breck at a place appointed, to enable him to make his escape.

The trial began by long pleadings upon the *relevancy of the indictment*, *i. e.* whether, upon such indictment, the prisoner could be brought to trial for his life. These pleadings, on the part of the prisoner, were extremely ill-judged; for the only objection which they urged to the procedure of the trial, which in the least consisted with law or common sense, was, that Allan Breck Stewart, the alledged actual murderer, ought to be tried and convicted ere the prisoner could be tried as his accomplice. And the pleadings were attended with this bad consequence, that they afforded an opportunity to the counsel for the prosecutor to prejudge the jury, by dressing up a tale of guilt; by making an ar-

1752 tificial arrangement of circumstances tending to criminate the prisoner, which, without such artful display, could not have impressed a conviction of his guilt upon simple and impartial men; so that in a country where the minds of men were exasperated against each other by political resentments, family feuds, and a long train of mutual injuries, the jury * might naturally confound the declamations of a lawyer with the testimonies of a witness.

The harangues of the prosecutors counsel were indeed remarkably violent and inflammatory. A chieftain, who has since relinquished the emoluments of the bar for the laurels of the field; who was reclaimed from the paths of rebellion (the error of his juvenile days) to the service of his country, was deterred by no motives of delicacy from appearing in this cause, and expiating his former offences against government by the zeal of his new-born affection. After expatiating on the danger to individuals, if the crime of assassination was to go unpunished, he proceeded thus: 'But what, I hope, my Lord, we all hold of greater importance than the safety of individuals; the interest, the honour, of this country is very nearly concerned, not to suffer the most daring and bare-faced insult to be offered to his Majesty's authority and government; and offered at a time when we, in common with his Majesty's other subjects, are reaping the fruits of his most benign reign. I say, my Lord, our interest, our honour,

* The following persons sat upon the jury: Colin Campbell of Carwhin, Dougal Macdougal of Gallanah, Alexander Duncanson of Kiles, Duncan Campbell of South-hall, Hector Macneil of Ardmeanish, James Campbell late bailie of Inverary, James Campbell of Rasheilly, James Campbell of Rudale, Colin Gillespie of Balimore, Colin Campbell of Skipnish, chancellor of the jury, Duncan Campbell of Glendaroul, Colin Campbell of Ederline, Niel Campbell of Duntroon, Archibald Campbell of Dale, and Niel Campbell of Dunstaffnish.

' nour, is concerned, not to ſuffer this, without endeavouring to 1752
' wipe off the ſtain from the country, to ſhew the King, and to
' ſhew the world, that this is the bloody deed of one or two
' wicked and deſperate men; a deed which the country abhors,
' and which it will not ſuffer to go unpuniſhed.'

A counſel who followed upon the ſame ſide, ſpoke out yet more explicitly the motives to this proſecution. He treats of the priſoner's character in theſe words: ' I will not ſay that his character in private life concurs againſt him; I have no authority from my employers to aſſert it; nor will I aſſert what is not ſupported by evidence: But I muſt ſay, that *his family and connections, his character and conduct in public life, are ſo many circumſtances forming a preſumption almoſt equal to a proof, in ſupport of the charge brought againſt him: Theſe are the moſt powerful adverſaries he has to ſtruggle with*, and from them that general opinion of his guilt has taken its riſe.'

The argument on the relevancy being finiſhed, the Court pronounced the only interlocutor which I apprehend they could do according to law: ' Repel the objections to the libel, and find the libel relevant to infer the pains of law: That, time and place libelled, the deceaſed Colin Campbell of Glenure was murdered, and that the pannel, James Stewart, was guilty actor, or art and part thereof; but allow the pannel to prove all facts and circumſtances that may tend to exculpate him; and remit the pannel, with the libel, as found relevant, to the knowledge of an aſſize.'

THE PROOF.

1752 Mungo Campbell, writer in Edinburgh, depoſed, that he ſet out from Edinburgh on the 7th of May laſt, in company with the deceaſed Mr Campbell of Glenure, to aſſiſt him in ejecting ſome of the tenants upon the forfeited eſtates of Ardſheil and Lochiel, over which the deceaſed was factor; which tenants, it was apprehended, would not remove till legally ejected: That they went to Fort-William; and, in their return, they arrived on Thurſday the 14th of May at the ferry of Ballacheliſh, purpoſing next day to eject ſome of the tenants of Ardſheil. The deceaſed, after waiting about an hour, and communing with ſome of the tenants, croſſed the ferry between four and five in the afternoon. Glenure and the deponent entered the wood of Lettermore, and coming to a part where the wood was pretty thick upon both ſides, ſo that the murderer could have eaſily concealed himſelf in the buſhes, and where the road was ſo rough and narrow that they could not ride conveniently two horſes a-breaſt, the deponent went foremoſt, and might have been about twice the length of the court-room before the deceaſed, when he heard a ſhot behind him, and heard Glenure repeatedly cry out, 'Oh! 'I am dead.' The deponent immediately returned to Glenure, alighted from his horſe, and alſo took the deceaſed off his horſe; then run up the hill from the road to ſee who had ſhot him. He ſaw, at ſome diſtance, 'a man with a ſhort dark coloured 'coat, and a gun in his hand, going away from him;' and there was ſo great a diſtance between them, that the deponent thinks he could not have known him although he had ſeen his face. As the deponent came nearer, he mended his pace, and diſappeared, by high ground being interjected between them. After Glenure was taken from his horſe, he leaned a while upon the deponent's

deponent's ſhoulder, endeavoured to open his breaſt to ſee where the bullets with which he was ſhot came out of his body, and was not able; but there were two holes in his waiſtcoat, over the belly, where the bullets had come out. After continuing upwards of half an hour in agonies, Glenure expired. Depoſed, That there are places in the wood ſo ſituated, that a perſon ſtanding there might ſee moſt part of the road from the ferry to the wood, and even part of the road from the ferry to Fort-William, ſome of which places are not a muſket ſhot from the ſpot where Glenure was murdered. 1752

John Mackenzie, ſervant to Glenure, depoſed, that, on the 14th of May laſt, when he was riding about a gun ſhot behind his maſter in the wood of Lettermore, he heard a ſhot, which he took to be the report of a muſket. It neither alarmed him, nor did he know whence it came; but, when he came up, he ſaw the preceding witneſs wringing his hands, and his maſter lying on the ground with a great deal of blood about him, juſt breathing, and not able to ſpeak. The deponent was deſired by the preceding witneſs to go in queſt of Mr Campbell of Ballieveolan and his ſons, inform them of what had happened, and entreat them to come immediately to the ſpot where the deceaſed lay. He was directed by a neighbouring tenant to go to the houſe of James Stewart, the priſoner, in expectation that he would learn from him where Ballieveolan was. The priſoner ſeeing the deponent weeping, inquired what the matter was? the deponent told him his maſter was killed; upon which the priſoner aſked him by whom, and how it was done? to which he anſwered, he did not know by whom, and believed it to be by a ſhot from a gun or piſtol. The priſoner wrung his hands, expreſſed great concern at what had happened, as it might bring innocent people to trouble, which he prayed might not be the caſe. Depoſed,

1752 fed, That, when his mafter and he were about three miles on their way coming from Fort-William, the day of the murder, they met John Beg Maccoll, a fervant of the prifoner's, going there, and that Maccoll had performed his journey, and returned to the ferry of Ballachelifh about the fame time with the deponent, his mafter and he having ftopped about an hour and a half, or two hours, on the road: That Maccoll was impatient to be ferryed over, and did crofs the ferry about half an hour before Glenure.

Donald Kennedy, fheriff-officer, depofed, That, when Glenure and his company were at the ferry of Ballachelifh, the deponent faw John Maccoll, the prifoner's fervant, who feemed to be in a hurry to crofs the ferry, Glenure faid to him, 'Sir, you 'travel better than I do.' To which he anfwered, 'I am in a 'hafte;' and fo went over the ferry about an hour before Glenure croffed it. The deponent, who was in company with Glenure, for the purpofe of executing the warrant of ejectment, croffed the ferry along with him, and went on before. When he had got about half a mile into the wood of Lettermore, he heard a fhot, which he did not regard, till hearing Mungo Campbell make a great noife, like one weeping, he returned, and Mungo faid to him, 'The villain has killed my dear uncle; adding, '*that he had only feen one man;* and that he, the deponent, afked 'no queftions, being in confufion, and dreading the fame fate 'himfelf.' Depofed, That, fome time after, when the people were gathered about the corpfe, John Maccoll was among them.

John Roy Livingftone depofed, That, on Thurfday the 14th of May laft, he faw Allan Breck Stewart in Ballachelifh in the forenoon, dreffed in a dun coloured great coat. In the evening, he faw John Maccoll, the prifoner's fervant, travelling at a good rate

rate from the ferry of Ballachelish to his master's house. The deponent joined him, asked where he had been? and got for answer, at Maryburgh (the village of Fort-William) for Charles Stewart, notary public. Maccoll farther told him, that Glenure was to be that night at Kintalline. About two hours after, the deponent, who was then in the wood of Lettermore, heard a shot, and on going up found that Glenure was murdered. 1752

Duncan Campbell *change-keeper* * at Annat deposed, That one day in April last, when Allan Breck Stewart was in his house, Allan said, that he *hated all the name of Campbell;* and bid the deponent, if he had any respect for his friends, tell them, that, if they offered to turn out the possessors of Ardsheil's estate, he would make black cocks of them; which the deponent understood to mean, that he would shoot them. Allan Breck said, that he had another quarrel with Glenure besides his turning the people of Ardsheil out of their possessions, viz. his writing to Colonel Crawfurd, informing that Allan Breck was come from France †, but that he was too cunning for Glenure; for that, when at Edinburgh, he had made up his peace with General Churchill, and got a pass. Deposed, That Allan Breck said twenty times he would be upsides with Glenure, and wanted nothing more than to meet him at a convenient place: That Allan Breck was not drunk, *for he could walk and talk as well as any man;* but it could easily be observed he had been drinking.

Robert

* Keeper of an Ale-house.

† Allan Breck Stewart had deserted from one of the British regiments of foot after the battle of Preston, joined the rebels, and afterwards enlisted in the French service.

1752 Robert Stewart deposed, That, some time in April last, he was in company with Allan Breck and the preceding witness. Allan complained much of Glenure's and Mr Campbell of Ballieveolan's conduct towards him, and particularly of Glenure's sending notice to Fort-William of his being in the country, so that he might be apprehended: But he would be upsides with him; and take an opportunity to despatch either him or Ballieveolan before leaving the country.—Allan Breck was much in drink when he uttered these expressions.

Malcolm Bane Maccoll change-keeper at Portnacrosh, deposed, That, in April last, Allan Breck Stewart, and John Stewart in Auchnacoan, sat up all night in his house drinking. Next morning, John Maccoll, servant to the deponent, came into the room in a shabby condition. Allan Breck asked who he was? John Stewart answered, an honest poor man with a numerous family of children, and it would be great charity in any body to assist him:—Upon this Allan Breck desired John Stewart to give him a stone of meal and he would pay for it. He then gave Maccoll a dram, and said, '*if he would fetch him the red fox's skin, he* '*would give him what was much better;* to which the said 'John Maccoll answered, that *he was no sportsman, and that he* '*was much better skilled in ploughing or delving.*' The deponent took little notice of these expressions at the time; but, after hearing of Glenure's murder, he believed that Allan Breck meant Glenure, as he was commonly called *Colin Roy*, i. e. *Red Colin.*

John Stewart of Fasnacloich deposed, That he told Allan Breck that Glenure was come from Edinburgh to remove the tenants; to which Allan Breck answered, if he had a warrant, there was no more to be said; but, if he had not a warrant, he would not be allowed to remove them.

John

1752 John Stewart, son to the preceding witness, deposed, That Allan Breck, after a visit of three days at his father's house, left it on the morning of Monday the 11th of May. He was then dressed in a long blue coat, red waistcoat, and black breeches, and had a feather in his hat; but, when the deponent met him next day at Ballachelish, he was dressed in a black short coat, with round white buttons, with a dark great coat over it; and he had on trousers and a blue bonnet. The deponent observed to Allan, that he had changed his dress, who answered, he did it because the day was warm.——John Stewart younger of Ballachelish swore, That he saw Allan Breck at the deponent's father's house on Tuesday the 12th of May last, and heard him ask questions about Glenure's travelling to Lochaber.

Catharine Maccoll, servant to the prisoner, deposed, That, on the afternoon of Monday the 11th of May, Allan Breck Stewart came to the prisoner's house dressed in a long blue coat, red waistcoat, and black breeches; but the prisoner was from home, having gone to Keels to meet Mr Campbell of Airds, and it was late at night before he returned: The family waited supper on him; and he supped in company with the said Allan Breck, a daughter and a nephew of the laird of Fasnacloich, and the prisoner's own family. Allan Breck did not lie all night in the house, but in a barn *; and next morning left her master's house. Allan Breck, when he left the house, had on a dun coloured

* This was nothing uncommon among the yeomanry in the Highlands of Scotland. In that hospitable country, such troops of visitors are entertained as would derange the oeconomy of a more polished people. When they go to rest, they are never incommoded for want of lodging; as sheets and blankets spread on heath, in a barn, form supplementary beds for such of the guests as the house cannot contain.

1752 great coat. On the evening of Friday the 15th of May, ſhe ſaw Mrs Stewart, the priſoner's wife, put into a ſack a long blue coat and a red waiſtcoat, which ſhe took to be Allan Breck's clothes, and was deſired by her to hide them without the houſe, which was done accordingly. On Saturday evening her miſtreſs deſired her to go for what ſhe had hid, and leave it at the back of the brewhouſe; ſhe did this alſo; and has not ſeen the clothes ſince.

Archibald Cameron depoſed, That, on Monday the 11th of May, he came to the houſe of the priſoner, who was not then at home, but arrived before night-fall. Allan Breck came there a little after the deponent. The priſoner and his family, Allan Breck, and the deponent, ſat in one room, and ſupped together; and he did not obſerve Allan Breck and the priſoner ſpeak in private that night. The deponent, and Allan Stewart, a ſon of the priſoner's, lay in one bed, and Allan Breck and Charles Stewart, alſo a ſon of the priſoner's, lay in another bed in the ſame barn. They all went to bed much about one time, and roſe together next morning; and the deponent did not ſee the priſoner about the houſe.

Alexander Stewart of Ballacheliſh depoſed, That Allan Breck came to his houſe in the afternoon of Wedneſday the 13th of May, and ſtaid with him till next day between eleven and twelve o'clock, when he went a-fiſhing in a neighbouring rivulet, and did not take leave of the deponent, ſince which time he has not ſeen him. As the murder happened that night, and as Allan Breck did not return to the deponent's houſe, he next morning 'really thought that Allan Breck Stewart might be *the actor* * 'in

* This expreſſion appears to me equivocal and ſuſpicious. It muſt here be obſerved,

'in this murder.' Allan Breck was dreſſed in a great coat, and under it a ſhort black coat with white buttons. 1752

Donald Stewart in Ballacheliſh depoſed, That, on Friday the 15th of May, he met the priſoner, and, upon expreſſing his regret at Glenure's murder, the priſoner joined with him; and added, that one Serjeant More, who, to the deponent's knowledge, had not been in the country theſe ten years, had threatened harm to Glenure in France. On the preceding evening, the deponent received a meſſage, that a perſon at a little diſtance from the houſe wiſhed to ſee him. He went, and found it to be Allan Breck Stewart, dreſſed in a great coat, and a dark ſhort coat under it, with white metal buttons. The deponent challenged him as guilty of the murder; he ſaid he had no concern in it, but believed he would be ſuſpected; and on this account, and being a deſerter, it was neceſſary for him to leave the kingdom: Therefore, as he was very ſcarce of money, he requeſted the deponent to go to the priſoner, *and acquaint him, that he Allan Breck was gone to Koaliſnacoan, and deſire him, if poſſible, to ſend him money there*. The deponent promiſed to deliver the meſſage, and did deliver it to the priſoner, who, without ſaying whether he was to ſend the money or not, aſked why Allan Breck himſelf did

 not

ſerved, that the common method of taking down written evidence in this country, is not to expreſs the actual words of the witneſs, but for the judge, or commiſſioner, to clothe the witneſs's ideas in the moſt ſuitable language that occurs to him. Thus the witneſs's idea, when committed to paper by the judge, is ſometimes very different from that which he delivered.—The judge who dictated to the clerk of court Mr Stewart of Ballacheliſh's evidence was the Duke of Argyle himſelf. I apprehend the deponent meaned only, that he really thought Allan Breck might be *guilty* of this murder; yet his evidence is ſo worded as to imply, that the actual *perpetrator* was not without *conſpirators*, who were joined with him in contriving this murder.

1752 not come for money if he wanted it? to which the deponent anſwered, that Allan told him he would be ſuſpected of the murder, and was a deſerter. The priſoner replied, he hoped in God Allan Breck was not guilty of the murder. On the Sunday after, the deponent met Alexander Bane Stewart packman *, who told him he had been at the priſoner's houſe of Aucharn, and had got either three or five guineas, to be left with John Breck Maccoll in Koaliſnacoan, for Allan Breck's uſe, if he called there.

John Macdonald of Glenco depoſed, That, on Friday the 15th of May, Allan Breck came to the deponent's houſe between three and four in the morning, when the family were all in bed, knocked at the window, and did not ſtay above a quarter of an hour, and gave him the firſt notice of Glenure's being murdered the evening before in the wood of Lettermore. Allan Breck ſaid he was going to leave the country, and had come to bid him farewell.

Mary Macdonald depoſed, That, on Sunday the 17th of May, a little before ſun-ſet, ſhe ſaw Allan Breck ſitting in the wood of Koaliſnacoan. On her approach he ſtarted to his feet; the common ſalutation paſſed between them; but ſhe was alarmed at meeting a man in a place ſo remote.

Allan Beg Cameron depoſed, That, about the 18th of May laſt, Allan Breck Stewart, his nephew, having come to his houſe, the deponent ſaid, he ſuppoſed Allan would be ſuſpected of the murder, who anſwered, he thought ſo too. The deponent preſſing him earneſtly to 'make a clean breaſt,' he declared he never had ſeen Glenure dead or alive. The deponent repeated his inſtances

ces

* Pedlar.

ces with him to tell what he knew of the murder, till at laſt he 1752
became angry. Allan Breck added, that his only fear was to be apprehended by the Military, which might prove fatal to him, as he had been a deſerter; and that Glenure's friends were at preſent in ſuch rage and fury, that he was very ſure, were he apprehended, he would be hanged.

Alexander Stewart of Innernahyle depoſed, That the priſoner was many years tenant to his brother, the Laird of Ardſhiel, upon the farm of Glenduror: That he was removed from his poſſeſſion by Glenure, factor upon this forfeited eſtate, and the lands given to Mr Campbell of Ballieveolan. The deponent being a near neighbour of the priſoner's, had frequent opportunities of converſing with him on the ſubject of his removal. The priſoner ſeemed diſſatisfied with it; adding, however, that he did not think Glenure would have removed him, if Mr Campbell of Ballieveolan had not ſought theſe lands from him. Depoſed, That the chief regret which the priſoner expreſſed for being turned out of his farm, was, that the children of the family of Ardſheil would thereby be deprived of the gratuity he was wont to tranſmit them. Depoſed, *That the priſoner removed voluntarily from the farm of Glenduror, without proceſs at law.*

Donald Campbell of Airds depoſed, That he was employed by Glenure as his ſub-factor upon the eſtate of Ardſheil. The priſoner told the deponent, that whatever was made of theſe rents over what was paid into the Exchequer, was accounted for to the children of Ardſheil; and, when the priſoner removed from the farm of Glenduror, he ſaid to the deponent, he had reaſon to believe the excreſcence of the rents of that farm would ſtill be accounted for to them; *and, in that caſe, he would be eaſy as to his own removal.*

Charles

1752 Charles Stewart, writer and notary deposed, That the prisoner wrote him a letter, desiring him to go along with the tenants of Ardsheil, and intimate to Glenure a sist which had been obtained upon a bill of suspension against their removing. The deponent accordingly went to Aucharn that night; and next day, which was the first of May, he went along with the tenants to Glenure's house, intimated the sist, and took a protest. The prisoner did not go along with him. On the 14th of May he got a second letter from the prisoner, desiring him to attend next day at the *ejection of the tenants*, but he declined going, because he did not choose to disoblige Glenure. When the deponent was at Aucharn on the 1st of May, he saw Allan Breck Stewart there, who was dressed *in a short black Highland coat, with white buttons and trowsers*. He then heard Allan Breck say, that he thought it hard in Glenure to remove the tenants of Ardsheil, when he did not remove those of Mamore.

John M'Corquodale in Ballachelish deposed, That, on the last night of December, he was present at Kintalline when Glenure, the prisoner, and some other company, met together: High words passed between them; and it being apprehended a quarrel would ensue, the deponent and some others took the prisoner out of the room. The prisoner was disobliged at being separated from Glenure, as he expected he would have gone home with him that night to the prisoner's house; and said, if nobody had interfered, *Glenure and he would have been good friends before they parted*.

Alexander Campbell in Teynaluib deposed, That, in the end of April, the prisoner stopped at his house to get his horse fed. He called for a dram; and one Maclaren, a merchant in Stirling, asked the prisoner to help the deponent to a dram; to which the prisoner

prisoner answered, '*he did not know any thing he would help the* 1752
'*deponent, or any of his name, to, if it was not to the gibbet.*'
The deponent replied, saying, it seems if any of the Campbells were at the gallows, the prisoner would draw down their feet; to which the latter rejoined, those 'of *some of them he would,* '*and of some of them he would not.*' The deponent then said, he supposed Glenure was the man of the name with whom the prisoner had the greatest quarrel, but he had no good cause for it; to which the prisoner answered, if Glenure had used the deponent as ill as him, by turning the deponent out of his possession, he would have had no less quarrel with Glenure than the prisoner had. Being interrogated for the prisoner, deposed, That the prisoner was perfectly sober, and the deponent thought these expressions proceeded from malice.

Colin Maclaren merchant in Stirling deposed, That, upon his desiring the prisoner to help their landlord, the preceding witness, to a dram, the prisoner said, he did not think he would help the landlord, or any of his name, to any thing but the gallows. The landlord then said, 'that it seemed if they were on 'the gibbet the *pannel* would draw down their feet; and he supposed it was on Glenure's account;' to this the prisoner answered, he could not say but it was; upon which an altercation took place between the preceding witness and the prisoner concerning the justice of the latter's being removed from his farm. The deponent and the prisoner rode on together from the house of the preceding witness; the conversation was renewed, the prisoner seeming to have much at heart the removal from his possessions. He said, he did not know what business either the Barons of Exchequer, or factors upon the forfeited estates, had to turn out tenants while they paid their rent: That he was going to Edinburgh to apply for a bill of suspension against the removing;

1752 moving; if he failed in his suspension, he would carry it to the British parliament; and if he failed there . . . (after a little pause, and with an emphasis) . . . '*he behoved to take the only other remedy that remained.*' Being interrogated for the prisoner, deposed, That, when the conversation began in the house of the preceding witness, he thought the prisoner in jest; but it was like to turn out very serious, as the prisoner and the landlord came to high words. The witness did not think the prisoner drunk while in the preceding witness's house, but some drams were drank upon the road, and the deponent thought the prisoner much the worse of drink when he used the above expressions about the British Parliament, and the only other remedy. Deposed, That the conversation turning upon an officer who was broke for cowardice, the deponent said it surprised him much, for he knew that this officer accepted of a challenge to fight from Glenure. The prisoner said, he esteemed that officer a better man than Glenure; one Murray who was in company having contradicted the officer's being so good a man as Glenure, the prisoner said, 'he knew the contrary; for that he himself had given Glenure a challenge to fight him, which Glenure declined;' and he desired Mr Murray to tell Glenure, '*he would fight him when he would;*' but Mr Murray declined to carry such a message.

Ewan Murray vintner, deposed, that the prisoner, and Mr Maclaren, the preceding witness, having stopped at his house, the conversation turned upon an officer in the army who was branded with cowardice, and the prisoner said, Glenure was as great a coward as that officer, for the prisoner had challenged him to fight, which Glenure declined; and he desired the deponent to tell Glenure so; but the witness said, he would not carry any such

ſuch meſſage from one gentleman to another.—At that time he thought the priſoner the worſe of drink. 1752

John More Maccoll, late ſervant to the priſoner, depoſed, That, about Chriſtmas laſt, as the deponent, and other ſervants of the priſoner's, were diſtilling ſome whiſky in their maſter's brewhouſe, after ſome previous converſation concerning Glenure, the priſoner ſaid, 'the tenants, or commoners, were likely to be 'very ill off; for, if Glenure went on in the way he then did, 'it was likely he would be laird of Appin in a very ſhort time; 'and that he (the deponent) *knew once a ſet of commoners in Appin who would not allow Glenure to go on at ſuch a rate*; to 'which the deponent and the reſt anſwered, that they knew no 'commoners in the country that could ſtrive or contend with 'Glenure.' Depoſed, That, on the day the priſoner went laſt for Edinburgh, Allan Breck Stewart ſaid to the deponent and Dugald Maccoll, that 'if they, the commoners, were worth 'themſelves, they could keep out Glenure, and hinder him from 'oppreſſing the tenants, in which caſe they would not be baniſhed from their natural poſſeſſions.' Allan Breck added, that 'he 'had it in his power to ſave or protect any body that would put 'Glenure from trampling upon the country in the manner he 'then did.'

Dugald Maccoll, ſervant to the priſoner, depoſed, That one morning laſt winter, when the deponent and other ſervants were in the priſoner's brewhouſe, he ſaid to them, that Glenure was like to hurt him, the priſoner, as much as in his power; but that was not the worſt of it; for, if Glenure proceeded in his preſent ſtile, it was probable he would be laird of Appin in five years: The deponent and the other ſervants ſaid it was ſo; upon which the priſoner obſerved, '*that* was the fault of the com-

1752. 'moners;' and added, 'that he once knew commoners in Ap-
'pin who would not allow Glenure to go on at ſuch a rate.' Depoſed, That, on the laſt night of December, Glenure, Mr Campbell of Ballieveolan, the priſoner, his uncle James Stewart in Ardnamurchan, and John Stewart younger of Ballacheliſh, were in company together at a public houſe at Kintalline: The deponent, by deſire of his miſtreſs, went there to attend his maſter home. The company continued drinking till it was late at night: They began to ſpeak very loud, and got upon their feet; but, as they ſpoke in Engliſh, the deponent did not underſtand what they ſaid: He, and ſeveral '*other commoners*' who were in the houſe, apprehending that the forementioned company were about to quarrel, went into the room in order to prevent it. As the company ſtill ſpoke loud, and in Engliſh, the deponent and his aſſiſtants carried the priſoner, and his uncle, Mr Stewart, out of the room. They inſiſted on going back to the company; and the priſoner would not move from the place where he ſtood till a meſſage was brought him from the company, ſignifying whether Glenure would wait upon him at his houſe next day. Being informed by Mr Stewart of Ballacheliſh that Glenure would wait upon him, the priſoner aſked, 'if Glenure 'had promiſed ſo upon his honour,' and was anſwered in the affirmative; and Glenure and Ballieveolan did accordingly dine at the priſoner's houſe next day. Depoſed, That the deponent and his aſſiſtants then carried the priſoner over a rivulet which lay between the houſe where they had been drinking and the priſoner's houſe at Aucharn. He aſked at them 'what kept them 'there ſo late, and why they did not go home in proper time of 'night? and they anſwering that they were there waiting upon 'him, the pannel replied, that *it was not waiting upon him they* '*were but upon Glenure, to ſee what they could get by him.*' Depoſed, That both the priſoner and his uncle were very drunk.

Depoſed,

Depofed, That, in March laft, when the deponent and John More Maccoll were harrowing one of the prifoner's fields, Allan Breck Stewart and they fell into converfation about their exiled friends in France: Allan Breck faid, it was a particular misfortune that the management of any concerns they left behind them fhould have fallen into the hands of Glenure, who was about to fhow them no manner of favour. He faid, 'the commoners of Appin 'were little worth when they did not take him out of the way 'before now;' and upon their faying nobody would run that rifque, Allan anfwered, that he knew how to convey out of the way any body who would do fo, in fuch manner that they fhould never be catched. He added, that they and the tribe of Maccoll were not like to be the leaft fufferers by Glenure's proceedings. He was then dreffed in a long blue coat, red waiftcoat, and black breeches, with a hat and feather; but, when he went from the prifoner's houfe to Rannoch, he was dreffed in a black fhort coat with filver buttons, belonging to the prifoner, blue and white ftriped trowfers, and a dun great coat, which the deponent thinks belonged to Allan Stewart, the prifoner's fon. Allan Breck had on the fame drefs when he came back from Rannoch; and the deponent does not remember to have feen him in that garb at any other time, except on the 11th and 12th of May laft. Depofed, That, on Friday the 15th of May, the deponent faw Catharine Maccoll, fervant to the prifoner, have fomething in a bag under her arm, which fhe faid was Allan Breck's clothes, and that fhe was going to hide them. Depofed, 'That upon Thurfday 'evening, the 14th of May, after notice of Glenure's murder 'came to Aucharn, Allan Stewart, fon to the pannel, defired the 'deponent, and John Beg Maccoll, to hide a large Spanifh gun 'that ufed to ftand in the brewhoufe; and told them that he him'felf had concealed a leffer gun that ufed to ftand at the end of 1752

1752 'the *girnel** in the barn, under the faid *girnel*, where he thought 'it would be fafe.' They did fo accordingly; but next day the prifoner, not thinking the place where the arms were concealed fufficiently fecret †, ordered the deponent and John Beg Maccoll to carry them from the place where they were hid, and hide them in the moor; and they accordingly lodged them in the cleft of a rock. Depofed, That the arms fo hid were a large Spanifh gun loaded with powder and *fmall fhot*, which Allan Breck was in ufe to carry in order to fhoot black cocks; a fmall gun not loaded, which Allan Stewart, the prifoner's fon, was in ufe to carry in the morning for the fame purpofe, and four fwords. Depofed, That, before the arms were thus hid, it was reported at Aucharn that foldiers were coming into the country.

John Beg Maccoll, fervant to the prifoner, depofed in fubftance conform to the two preceding witneffes, as to the prifoner's complaining to them that Glenure was no friend of his, and that he once knew a fet of commoners in Appin who would not allow Glenure to carry matters with fo high a hand. Depofed, That the deponent and Dugald Maccoll communed together on the import of their mafter's expreffions, revolving whether it was an encouragement to deftroy Glenure, or a complaint againft the commoners of Appin, as not being fo faithful to the prifoner as he expected. Depofed, That Allan Breck came to the prifoner's houfe in March laft, ftaid there for fome days, made little excurfions in the neighbourhood, and came frequently back again. In particular,

* A meal ark, or corn cheft.

† The ftatute of King George I. for difarming the northern counties, had been lately renewed with additional feverities. Arms being found in the poffeffion of perfons of a certain defcription, fubjected the poffeffors to heavy penalties; Stat. Geo. I. ann. 1mo cap. 54.; Geo. 2di. ann. 19no, cap. 39.

particular, he came to Aucharn on Monday the 11th of May about mid-day, dreſſed in a long blue coat, red waiſtcoat, black pluſh breeches, hat and feather; but in the evening he was dreſſed in a black ſhort coat and ſilver buttons, belonging either to the priſoner or his ſon; and he, Allan Breck, thus dreſſed, came and aſſiſted the deponent, and his fellow ſervants, *in covering potatoes*. When Allan Breck arrived at Aucharn on the 11th of May, the priſoner was ſeeing the deponent and his other ſervants covering potatoes. Allan Breck ſeated himſelf beſide the priſoner, and they had ſome converſation in Engliſh, which the deponent does not underſtand. Depoſed, That, on Thurſday the 14th of May, the priſoner gave the deponent a letter to be delivered to Charles Stewart notary public at Maryburgh, and told him that the purpoſe of the letter was to deſire Charles Stewart to come and take a proteſt againſt Glenure, in caſe he had no ſufficient warrant to remove the tenants of Ardſhiel. The priſoner deſired the deponent to make all poſſible deſpatch, and to go by the ferry of Kintalline, being a ſhorter way than by the ferry of Ballacheliſh. The priſoner alſo told him to get ſome money from William Stewart merchant Maryburgh, to pay for milk cows which were bought for him, and that, if the money was not ſent, he would not get the cows. The deponent ſet out from Aucharn between ſeven and eight in the morning. He met Glenure at the three mile water, knew his ſervant, had ſome converſation with him, and told him, that he, the deponent, was going to Fort-William; and he arrived there about twelve o'clock. He delivered the letter he got from the priſoner to William Stewart merchant in Maryburgh, who told him, that Charles Stewart, the notary, was from home, having gone to the Braes of Lochaber; but that Glenure had a notary with him, which would anſwer the purpoſe of both. The deponent got no money from William Stewart, ſtaid a very little while at Fort-William, returned by the

ſhort

1752

1752 ſhort road to the ferry of Ballacheliſh, and found Glenure arrived at the ferry before him. The deponent wanted to croſs immediately; the ferryman bid him wait till he ſhould be taken over with Glenure's horſes; but the deponent obſerving that the time of the tide, and the rapidity of the ſtream, would occaſion a conſiderable delay ere the horſes could be taken over, made the ferryman croſs with him immediately; and this was about four o'clock. The deponent proceeded in his journey, paſſed through the wood of Lettermore, and neither met nor ſaw any body; and when he went that day to Fort-William with the letter to the notary, *he had no orders from his maſter to inquire after Glenure's motions, or to acquaint any body of them.* An hour was hardly elapſed after the deponent's arrival at his maſter's houſe, ere Glenure's ſervant came to the door calling for the priſoner; and being aſked what news? he anſwered, 'the worſt I ever had; my maſter is murdered in the 'wood of Lettermore; upon which James Stewart ſaid, Lord 'bleſs me, was he ſhot? to which the ſervant anſwered, that he 'was ſhot; and ſaid the pannel ought to go and take care of 'his corpſe.' But neither the priſoner, nor any of his family, went near the corpſe; for he ſaid, 'that, as he and Glenure were not in good terms, and ſome of the people who were to meet Glenure had arms, he did not incline to go near them, not knowing what might happen. The priſoner ſaid, 'this was a 'dreadful accident, and he was afraid would bring trouble on 'the country;' and appeared to be ſorry for what had happened. Depoſed, That late on Thurſday evening, after the news of Glenure's murder had arrived at Aucharn, the priſoner's wife ordered Dugald Maccoll and the deponent to hide all the arms that were about the houſe, as it was probable that a party of ſoldiers would be ordered into the country. They accordingly took a large loaded gun out of the brewhouſe, and hid it under the

the thatch of the ſheep-houſe. They inquired, at the ſame time, for the little gun that uſed to lie in the barn, and were told by Allan Stewart, the priſoner's ſon, that he had hid it under the large *girnel*; and they concealed four ſwords under a parcel of thatch. Next day they were deſired by their miſtreſs to hide the arms better; and they took the large loaded gun and the ſwords from the places where they had concealed them, and the little gun, which was not loaded, from under the girnel, where Allan Stewart ſaid the night before he had laid it, and hid all of them at ſome diſtance from the houſe. Depoſed, That he ſaw the little gun either on the Tueſday or the Wedneſday preceding the murder, and gave as the cauſe of his not ſeeing it on Thurſday, 'that he was from home almoſt all that day.' He did not ſee the little gun loaded ſince the month of March, when the black cocks were crowding. At that time he ſaw Allan Breck carry it out one morning loaded with ſmall ſhot, who told the deponent that it miſſed fire thrice when he preſented it at a black cock, and went off the fourth time without killing the bird. Depoſed, That neither of the guns were in good order; for the large one, when the trigger was drawn, uſed to ſtand at half cock, and the little one had an old worn flint, and was in uſe to miſs fire.

1752

Captain David Chapeau of General Pultney's regiment depoſed, That, upon information given by Mr Campbell of Barcaldine, that there were ſome arms hid among the rocks near the priſoner's houſe, he went thither with a party of his men, and found the arms above deſcribed. The large gun was loaded with ſmall ſhot; the little gun was not loaded, and appeared to have been lately fired; for he put his finger into the muzzle, and it came out black. Being interrogated by the priſoner, whether a muſket laid by foul will not give that appearance to the finger a month after it has been diſcharged? depoſed, he cannot tell, not being

1752 being accuſtomed to ſee arms uſed ſo. Depoſed, That the lock of the unloaded piece had but one ſcrew nail, and the other end of the lock was tied to the ſtock with a ſtring: That a gun in ſuch a ſituation may be fit enough to be 'fired with:' That he took the fuzees along with him to Fort-William, and delivered them to the adjutant; and the deponent does not know by what means the lock now miſſing, which belonged to the little gun, was loſt, but believes it to have been by accident.

William Stewart merchant in Maryburgh depoſed, That he did not ſend to the priſoner the L. 8 to pay for the cows, which John Beg Maccoll ſought in the priſoner's name on Thurſday the 14th of May; but, on Friday the 15th, he got a ſecond meſſage by Alexander Stewart *packman* *, who told the deponent that he was going to Glenevis to get payment of a horſe bought from the deponent, and that he muſt alſo get from the deponent L. 5 towards payment of ſome cows which the priſoner had bought for him at Ardſhiel, as the cows were not to be delivered till payment of the money. The deponent, however, was not in caſh; but next day, as the pedlar returned from Glenevis, the deponent's wife, who was anxious to have the cows, ſent three guineas by the pedlar to the priſoner, and, accordingly, in about eight days, ſhe got two of the cows, but ſhe never got the other two. Depoſed, That he ſaw Allan Breck at the priſoner's on the 1ſt of May, dreſſed in a ſhort black coat and clear buttons. Allan Breck told the deponent he had been a ſoldier in the King's troops at the battle of Preſton, and afterwards was in the rebellion; and he ſeemed to be on the watch leſt he ſhould be ſearched for.

Alexander Stewart, travelling packman, depoſed, That, upon Friday the 15th of May, about mid-day, the priſoner deſired the deponent to go to Fort-William to William Stewart merchant, and

* Pedlar.

and get L. 5 from him; for the prisoner's friend, Allan Breck, 1752
was about to leave the country, as troops were coming into it, and he might be suspected of Glenure's murder. The prisoner said it was incumbent upon himself to supply his friend, Allan Breck, with cash; and, therefore, he bid the deponent tell William Stewart he must send the money, although he should borrow it from twenty purses; and that he must also advance L. 5 to John Breck Maccoll bouman at Koalisnacoan, if he came to demand such a sum. The prisoner desired the deponent to seek L. 4 more from him, being the price of two milk cows. In consequence of these messages, the deponent went to Fort-William, and asked from William Stewart the two sums mentioned. Stewart said he had not the money, and desired the deponent to proceed with his message to Glenevis, and he would see him tomorrow and give him the money. The deponent accordingly called next day in his return; but all he got was three guineas. With this he went back immediately to Aucharn, where he arrived in the evening. Mr Stewart was not at home:—*But, in a quarter of an hour, intelligence arrived, that both Mr Stewart and his son Allan were made prisoners.* Mrs Stewart went immediately to the place where her husband and son were apprehended, and the deponent accompanied her. They found Mr Stewart a prisoner. The deponent having opportunity to converse with him apart, told him he had brought three guineas. Upon this the prisoner pulled out a green purse, out of which he took two guineas and gave them to his wife, who immediately delivered them to the deponent; and the prisoner desired 'that the five 'guineas should be sent to that unhappy man (meaning Allan 'Breck) to see if he could make his escape; and pitched upon 'the deponent as a person that should go with the money.' Soon after the prisoner was carried off by a party of soldiers to Fort-William, his wife and the deponent returned to Aucharn; and

the

1752 the foldiers, with their prifoner, ftopped there by the way and drank a dram. After the deponent had fupped, Mrs Stewart told him that he muft go immediately to Allan Breck with the five guineas and his clothes, who would be found at Koalifnacoan; that, if the deponent fhould not meet him, he might deliver the money and clothes to John Breck Maccoll, the bouman; but by no means to take the clothes to Maccoll's houfe, left any body might fee them. The deponent, with great reluctance, after being much entreated by Mrs Stewart, undertook the commiffion; he arrived at Koalifnacoan on Sunday morning, a little after day-light, and left the clothes at the root of a fir tree at fome diftance from the houfes. He then met John Breck Maccoll the bouman, delivered him the five guineas, and pointed out where the clothes lay. The bouman told him, that Allan Breck was at Corrynakeigh, a little above the houfe of Koalifnacoan: The deponent then went to fleep in the bouman's houfe, dined with him, and returned to Aucharn in the evening, where he found the prifoner's wife perfectly fatisfied, upon being informed that the deponent had configned the money and clothes to the care of the bouman.

John Breck Maccoll depofed, That, on the afternoon of Saturday the 16th of May, as he was in a fir bufh in Koalifnacoan, he heard a whiftle. Upon looking up, he faw Allan Breck at a little diftance, beckoning to the deponent to come towards him. After mutual falutations, the deponent told him, he was afraid it was no good action that occafioned his being in fo remote a place; and the deponent charged him with being guilty of Glenure's murder. Allan Breck afked the deponent what he had heard about the murder? He anfwered, that two poor women told that Glenure was murdered on Thurfday evening in the wood of Lettermore; that two perfons were feen going from the place

place where the murder was committed, and that Allan Breck 1752
was ſaid to be one of them. Allan Breck anſwered, he had no concern in it; and, if his information was right, there was but one perſon about the murder; but, as he was idle in the country, he was ſure he would be ſuſpected of it. This, he ſaid, would give him little concern if he had not been a deſerter, which would bear harder upon him, in caſe of his being apprehended, than any thing which could be proved againſt him about the murder. He ſaid, he did not doubt but the family of Ardſhiel would be ſuſpected of the murder; and it was probable the priſoner and his ſon Allan might be taken into cuſtody about it; and he 'was afraid Allan Stewart, the pannel's ſon's tongue was 'not ſo good as his father's; by which words the deponent un-'derſtood, that Allan was eaſier to be entrapped than the pan-'nel.' Allan Breck told the deponent, he muſt remain in that neighbourhood till ſome neceſſaries which he expected were brought to him; and that, unleſs ſome money came to him before next morning, the deponent muſt at all events go to Fort-William with a letter. This the deponent refuſed; but Allan Breck, notwithſtanding, picked up a wood pigeon's quill, made a pen of it, made ſome ink of powder which he took out of a powder horn that was in his pocket, and wrote a letter to be delivered by the deponent to William Stewart merchant in Maryburgh. The deponent objected, that every body who went to Fort-William was ſearched. Allan Breck anſwered, it was an eaſy matter to hide a letter; but, if he was apprehended, it muſt by no means be found upon him;—*he muſt eat it, rather than that it ſhould be found.* At this time Allan Breck was dreſſed in a dun coloured great coat, black ſhort coat, and blue trowſers, ſtriped with white. Early next morning, being Sunday the 17th, the deponent met Alexander Stewart, the preceding witneſs, who inquired for Allan. Being worn out with fatigue, and two

 nights

1752 nights want of ſleep, he went to reſt in the deponent's houſe, and gave him five guineas, and Allan Breck's own clothes, to be delivered to Allan. At night, after the deponent had gone to bed, he heard ſomebody rapping at the window. He got up, went out of the houſe in his ſhirt, and ſaw Allan Breck at a little diſtance, who inquired if any meſſage had come for him. The deponent anſwered, that his uncle's ſon had come with five guineas and ſome clothes to him. The deponent expreſſed his fears that Allan Breck would ſtarve among the heath; and regreted that he was unable to help him. Allan ſaid, he had no occaſion for victuals, but wanted a drink very much. Upon this the deponent went back to his houſe and fetched a diſh of whey, and the five guineas, and delivered them to him, and alſo gave him his clothes. He told Allan, that the priſoner and his ſon were apprehended on account of Glenure's murder; Allan anſwered, 'that was no more than he expected; but it would not ſignify 'much, as there could be no proof againſt them; but expreſſed 'ſome apprehenſion leſt Allan Stewart, ſon to the pannel, might 'be betrayed by his own tongue *.' Next morning the deponent found Allan Breck's borrowed clothes, and the diſh which held the whey, lying together at the place where they had parted the night before; and ſince that he has not ſeen him. Depoſed, That, about two years ago, a converſation paſſed between the deponent and the priſoner about Glenure's being to take the management of the eſtate of Ardſhiel from him, which would diſable him from being of any ſervice to Ardſhiel's children; and the priſoner then ſaid, '*he would be willing to ſpend a ſhot upon* '*Glenure, though he went upon his knees to his window to fire* '*it.*'

Hugh

* This witneſs, and another of the priſoner's ſervants, as well as their maſter, and his ſon Allan, were committed cloſe priſoners in ſeparate apartments at Fort-William.

Hugh Maclean, barber in Maryburgh, depofed, That he was fent for to the prifon by Mr Stewart to fhave him. He afked what news? The deponent anfwered, he heard that the prifoner was to be carried to Edinburgh on the Monday following. The prifoner replied, that was a matter which gave him no concern; he 'wifhed it had happened fooner; and was afraid of nothing, 'but that his fervants might take money, and turn againft him; 'and defired the deponent, as from him, to tell his fervants to 'fay nothing but truth, to keep their minds to themfelves, and 'he would take care of them.' He gave the deponent a fhilling. The deponent delivered the meffage to the prifoner's fervants, and alfo told his fon of the meffage he carried from his father to the fervants, and the fon gave him half-a-crown. 1752

Hugh Stewart in Edinburgh, a witnefs cited for the prifoner, depofed, That Allan Breck was in ufe frequently to pafs between France and Scotland; that he lodged, when at Edinburgh, in the deponent's houfe; and that he ufed only to go abroad under cloud of night, being afraid to be feen, as he was a deferter.

Catherine Macinnes depofed, That, on the evening of Glenure's murder, fhe faw Allan Breck in the moor of Ballachelifh. He afked what was the occafion of the ftir in the town? She anfwered, Glenure was murdered. He inquired who committed the murder? and fhe faid fhe did not know. He then requefted the deponent 'to tell Donald Stewart in Ballachelifh *to go to the* '*pannel and defire him to fend the faid Allan money; and that fhe* '*delivered this meffage to Donald Stewart that fame night.*' She told the faid Donald Stewart where fhe had feen Allan Breck.

John Stewart younger of Ballachelifh depofed, That, on the day after Glenure's murder, the deponent was in the prifoner's houfe,

1752 houſe, who told him of his having got a meſſage from Allan Breck that morning, by Donald Stewart, to ſend him money, which the priſoner ſaid he was reſolved to do.

Several witneſſes depoſed to their having ſeen Allan Breck dreſſed occaſionally in a black ſhort coat and white buttons;—and John Cameron of Strone, and Ewan Cameron his ſervant, depoſed, That they heard one Serjeant More threaten to ſhoot Glenure, on account of his hard uſage of the tenants of Ardſhiel.

Verdict of the Jury.

They found, '*unanimouſly*, the pannel, James Stewart, guilty, 'art and part, of the murder of Colin Campbell of Glenure.'

Sentence of the Court.

They adjudged the priſoner to be taken, on Wedneſday the 8th of November, to the ſouth ſide of the ferry of Ballacheliſh, to be hanged on a gibbet till he be dead, his body to be hung in chains, and his perſonal eſtate to be forfeited.

The Duke of Argyle, Lord Juſtice General, then addreſſed the priſoner in a ſpeech of conſiderable length; a ſpeech upon which I decline to preoccupy the reader's remarks by any of my obſervations. The Duke began by telling the priſoner that he had a 'moſt impartial trial,' and that he had been proſecuted 'with all the moderation conſiſtent with the crime' of which he ſtood accuſed. His Grace then ſpeaking of the murder of Glenure, whoſe oppreſſions appear to have ſo deeply affected the family of Ardſhiel, and their dependents, told the priſoner, 'it may

'be

'be ſaid of you, that you firſt eat his bread, and then ſhed his 'blood.'

After deſcanting upon the different rebellions raiſed by the partiſans of the houſe of Stuart, and particularly that of 1745, the Duke proceeded: 'If you had been ſucceſsful in that rebel-'lion, you had been now triumphant with your confederates, 'trampling upon the laws of your country, the liberties of your 'fellow ſubjects, and on the Proteſtant religion: You might have 'been giving the law where you now have received the judg-'ment of it; and we, who are this day your judges, might have 'been tried before one of your mock courts of judicature, *and* '*then you might have been ſatiated with the blood of any name* '*or clan to which you had an averſion.*'

'Though you don't now ſtand accuſed as a rebel, nor am I 'permitted to call you a traitor, becauſe his Majeſty's undeſer-'ved mercy to you did ſeveral years ago reſtore you to the ſtate 'of an innocent man; yet I may ſay, with great force of truth, 'that this murder has been viſibly the effect and conſequence of 'the late rebellion.'

The priſoner then addreſſed the Court in theſe words: 'My 'Lords, I tamely ſubmit to my hard ſentence. I forgive the 'jury, and the witneſſes, who have ſworn ſeveral things falſely 'againſt me: And I declare before the great God, and this au-'ditory, that I had no previous knowledge of the murder of 'Colin Campbell of Glenure, and am as innocent of it as a 'child unborn. I am not afraid to die; but what grieves me, is 'my character, that after ages ſhould think me capable of ſuch 'a horrid and barbarous murder.'

On

1752 On the fatal day, the priſoner was eſcorted by a ſtrong military guard to the place of execution. He produced three copies of a paper containing his dying ſpeech; one of theſe he delivered to the civil magiſtrate, another to the commander of the troops which guarded him, and the third he read with a diſtinct voice to a great multitude of ſpectators which had come to witneſs his execution. And in his ſpeech *, which was very minute, he denied all acceſſion to, or previous knowledge of, Glenure's murder.—The minds of the ſpectators, already engaged with the circumſtances of this extraordinary trial, and the awful ſcene which was before them, were ſtruck with ſuperſtitious terror at the tempeſt which raged during the time of the execution.—And the priſoner went through the laſt act of this tragedy with compoſure unalloyed with meanneſs, and fortitude not tinctured with arrogance.

A criticiſm upon the nature and amount of the minute detail of circumſtantial evidence led in this proſecution would fatigue the reader, and ſwell this trial to a ſize unſuitable to this work. I ſhall therefore briefly call the reader's attention to the leading circumſtances tending to the conviction or acquittal of the priſoner.

The

* Scots Magazine, vol. 14. p. 509. 525. 555. The ſpeech is printed in this Magazine. Mr Stewart complains in it of the harſh and unfair treatment he ſuffered from the proſecutors, from the 16th of May, that he was apprehended without *any written warrant*, and carried priſoner, under cloud of night, to Fort-William, till the end of his trial.

The guilt charged againſt him is, that he was acceſſory to, and 1752
art and part in conſpiring the murder of Glenure, which was perpetrated by Allan Breck Stewart. Therefore, if there be not legal evidence that Allan Breck was the murderer, the charge of guilt vaniſhes, and it becomes perfectly unneceſſary to conſider the ſecond propoſition, viz. the priſoner's acceſſion to the murder alledged to have been committed by Allan Breck.

The only poſitive evidence relative to the perpetrator of this murder, is, that it was committed by 'a man with a ſhort dark 'coloured coat,' and this is, in ſome reſpect, applicable to Allan Breck, as he was ſeen on the day of the murder, not far from the place where it was committed, dreſſed in a dun coloured great coat, and dark ſhort coat. Allan Breck did frequently uſe threatening expreſſions againſt the deceaſed, and he did diſplay the moſt indubitable ſigns of fear and guilt. But it is certain that his guilt, as a deſerter, was heightened by his having been in the rebellion, and that his life was thus forfeited to his country; and the reader muſt determine with himſelf whether Allan Breck's fear of being apprehended proceeded from the deſertion, of which he was notoriouſly guilty; or from this recent murder, of which, even independent of guilt, he had reaſon to conclude he would be ſuſpected, on account of his connection with the family of Ardſhiel, and of his fugitive and wandering life.

The circumſtances from which the proſecutors inferred the priſoner's acceſſion to this murder, may perhaps be fit enough to excite a ſuſpicion of guilt in the ſpeculations of the cloſet, but I apprehend them to be in the higheſt degree improper and dangerous, to be produced as evidence to affect the life or fortune of a priſoner in the tribunal of juſtice.

1752 The circumſtances were ſhortly theſe: That Allan Breck, a kinſman of the priſoners, paid him a viſit three days preceding the murder, ſat with him and other company at ſupper, and ſlept in a barn: That Allan Breck put off his French clothes, dreſſed himſelf in a ſhort coat belonging to the priſoner, or his ſon, ere he went to work in a field of potatoes; and next morning, when he left the houſe, went off dreſſed in the ſhort clothes, and left his own; which, by the bye, he had done upon former occaſions: That the priſoner, upon the ſearch which was to be made for the murderer of Glenure, ſupplied with money, for the purpoſe of making an eſcape, his kinſman, Allan Breck, a fugitive, and a deſerter: That the guns about the priſoner's houſe were hid, in a country where it was a crime to be poſſeſſed of arms: That the priſoner had uſed repeated expreſſions of reſentment and of vengeance againſt Glenure; and that, after the murder, Allan Breck expreſſed his apprehenſion leſt the priſoner or his ſon ſhould be betrayed by their own tongue.

Theſe are the amount of the evidence againſt the priſoner, which reſulted from a ſcrutiny, by no means warrantable, into his life and conduct. The rigorous durance in which he himſelf was confined, and his ſon and ſervants being kept cloſe priſoners in ſeparate apartments, have been already mentioned. His repoſitories were thrice ſearched by the proſecutors relations * without legal warrant, and attended by a military force: And every circumſtance of his life and converſation, for a period of two years, was raked into with the moſt invidious induſtry. But this laſt mode of extracting evidence, and the reſult which flowed from it, require to be particularly conſidered.

Where

* Trial of James Stewart, p. 34. Edinburgh, printed for Hamilton and Balfour, 1753. This publication, which contains the ſpeeches of the Lord Juſtice General, and of the counſel, as well as the whole of the recorded trial, ſwells to the enormous bulk of 437 pages 8vo.

Where there is no positive evidence demonstrating the author 1752
of a mischief which an individual has sustained, menacing expressions may be justly admitted, along with other circumstances, as a link of the chain of circumstantial evidence against a prisoner. But, to lay much stress upon general expressions of resentment, and even of vengeance, such as, 'I wish he were hanged;' 'he 'is unworthy to live;' 'I will cause him to repent it,' or the like, would lead to a conclusion equally false and fatal. In social intercourse, the energy of our expressions of applause or of censure, of gratitude or of resentment, is often proportioned to the strength rather of our language than of our feelings. But, if a deep and mortal blow be meditated, I apprehend the deviser, instead of suiting his expressions to his purpose, would endeavour, by the smiles of his countenance, and the smoothness of his language, to conceal the rancour of his heart.

Let any person who has laboured under embarrassed circumstances, who has felt for the distress, for the impending ruin of his family; who has been chastised by the rod of power, reflect upon the expressions of resentment and of anguish which may have escaped him when his heart was open to a friend, when his passions were inflamed by liquor; and then let him condemn (if he can) the prisoner as a murderer, on account of the expressions of vengeance which are proved against him in the course of this trial.

The only part of the evidence affecting the prisoner which makes a serious impression upon me, is what fell from Allan Breck in the wood of Koalisnacoan, that he was afraid lest the prisoner's son 'might be betrayed by his own tongue *.' The following reasons,

 however,

* Unless that rule in the scriptures, of visiting the sins of the father upon the children.

1752 however, lead me to doubt the ſafety and propriety of making ſuch an expreſſion as this the foundation of taking away the life and fame of a priſoner: 1*mo*, The witneſs who depoſed to it trembled under the rod of power; he had been confined to cloſe cuſtody in Fort-William, and perhaps dreaded that he himſelf might be brought to trial for this murder. 2*do*, The ſmalleſt variation from Allan Breck's expreſſion, proceeding from miſconception, or want of memory in the witneſs, or from the miſtake of the interpreter who tranſlated the evidence, might make an important difference in the concluſion to be drawn from Allan Breck's words. For inſtance, if Allan Breck, inſtead of ſaying he was afraid the priſoner's ſon 'might *be betrayed by his own* '*tongue*,' did ſay, he was afraid the priſoner's ſon 'might *fall a* '*victim to his own tongue*;' in this caſe, Allan Breck would have ſaid no more than what was notoriouſly juſt and true, viz. that the reſentful expreſſions uſed by the priſoner and his ſon againſt Glenure would bear hard upon them.

This trial, upon the whole, points out the propriety of two alterations being adopted in the criminal law of Scotland: 1*mo*, That the priſoner ſhould here, as in England, have a power of challenging a certain number of the jurors, without cauſe aſſigned. 2*do*, That, in the Highlands of Scotland, where the diſtricts

children is to be *inverted* by our law, and the ſins of the children are to be viſited upon the father, I entertain a faint ſuſpicion that a miſtake has been committed in the courſe of this trial, and that (if any of the family was guilty) the priſoner has been hanged inſtead of his ſon Allan. The circumſtances of the little gun in the depoſitions of Dugald and John Beg Maccoll's, and Allan Breck's fear leſt the priſoner's ſon's tongue ſhould betray him, afford a more pointed evidence againſt the ſon than any which is adduced againſt the father. Beſides, it is worthy of remark, that the priſoner's ſon had a coat preciſely of the ſame make and colour with that which Allan Breck wore on the day Glenure was murdered.

ſtricts are peopled by tribes or clans, between many of which inveterate feuds did ſubſiſt, a priſoner ſhould have it in his power to ſay, 'I who am a Stewart will not be tried by a jury of Campbells, for the murder of a Campbell;' or, 'I who am an officer of exciſe, will not be tried for the murder of a ſmuggler, in a country where all the merchants, farmers, &c. are ſmugglers.' And, as the lawyers for the crown have it in their power to bring a priſoner from the diſtrict where he lives, or where a crime has been committed, to ſtand trial before the High Court of Juſticiary at Edinburgh, ſo a priſoner likewiſe ſhould have it in his power to avoid the prejudices which may be entertained of him in a particular diſtrict, and to claim being tried at Edinburgh. 1752

Malcolm M'Gregor, alias John Grant, for the Murder of John Stewart, both of the Pariſh of Glengairn, in Aberdeenſhire. —Doctrine of Preſcription of Crimes Eſtabliſhed.

THE priſoner was brought to trial before the Circuit Court of Juſticiary, at Aberdeen, in Spring 1773; but, as he pleaded in bar of the action, a general point of law of great importance, his Majeſty's Advocate-depute *deſerted the diet* *, recommitted the priſoner upon a new warrant, and ſerved him with a new indictment; upon which he was tried before the High Court of Juſticiary, at Edinburgh, on the 26th of July 1773. He was charged with enticing John Stewart tenant in Abergairn, on the evening of Chriſtmas day 1747, to a remote place, and there, from premeditated malice, ſtriking him from behind 1773

* *i. e.* dropped the proſecution.

1773 behind with a ſtick, and then ſtabbing him in the left ſide with a durk, ſo that he died that ſame night *; and that, before his death, he declared it was the priſoner who had thus aſſaulted and wounded him: That the priſoner immediately fled, changed his name from Malcolm M'Gregor to John Grant, and had not ſince been ſeen in that part of the country, except to a few perſons privately, and under cloud of night.—And that a warrant for apprehending him was iſſued by the late Lord Minto, on the 21ſt of January 1748; but, by reaſon of the priſoner's changing his name and place of abode, he never could be found till lately, that he was diſcovered and apprehended by the ſheriff of Edinburgh.

The celebrated Alexander Lockhart, counſel for the priſoner, repreſented to the Court, that no action could lie upon this indictment; becauſe the crime charged in it was ſaid to have been committed in the year 1747, and conſequently *was preſcribed by the lapſe of more than twenty years.* Counſel were heard at great length. The Court then ordered both parties to lodge *informations* †, in order to their being recorded in the books of adjournal.

In the information upon the part of the Lord Advocate, it was argued, 1*mo*, That the vicennial preſcription of crimes in the Roman law, which the priſoner made the foundation of his plea, did not extend to every ſpecies of crime; but that, in thoſe of a deeper die, ſuch as parracide, and ſome others *inter graviora delicta*, no preſcription took place. 2*do*, That the civil law

* Records of Juſticiary, 26th July, 9th Auguſt 1773.

† A law caſe in Scotland, which contains both the fact and the argument, is ſometimes entitled an *information*, and ſometimes a *memorial*.

law was no part of the common law of Scotland, although its rules were often adopted, and its principles much respected, in such cases as did not fall within the enactment of our statutes, the decisions of our Courts, or the opinions delivered in approved systems of our law. His Lordship next maintained, that, in the common law of Scotland, there was no vestige of a prescription in crimes; for the punishment of murder was a part of the most ancient common law of Scotland; but our old treatises made no mention of the doctrine of prescription; nay, the word prescription was not to be found till the year 1469, when it was introduced in a statute; and, even then, it related to civil obligations, and not to crimes.— His Lordship maintained, that the opinions of our commentators upon this head, which were urged in behalf of the prisoner, viz. those of Sir George Mackenzie, Mr Forbess, and Mr Erskine, were neither sufficiently explicit, nor of sufficient authority, to make the prescription of crimes be deemed a part of our law; and, on the other hand, Lord Fountainhall laid down this doctrine, that the vicennial prescription of crimes had no place with us. And that, in the whole of our records, no judgment could be found sustaining this plea in bar of action, while there were many instances of persons being tried for crimes more than twenty years after their commission. Farther, it was contended, that, by *the law of God, which is a part of our law*, there is no prescription of murder. And, *lastly*, That it would be highly inexpedient to establish a defence in bar of prosecution against a murderer; because nothing contributes more to check murder, and other atrocious crimes, than an impression upon the minds of the people, that, when once committed, no lapse of time will expiate the offence in this world, or prevent the punishment. There was also subjoined to the information for the prosecutor, a list of cases from the books of adjournal, where prisoners were tried

1773

1773 tried at the diſtance of more than twenty years from the commiſſion of the crime. They were moſtly in trials for witchcraft, and one of them for inceſt committed thirty-five years before.

It was ſtated in the information for the priſoner, that, although conſcious of innocence, and certain that he could not be convicted by a fair proof of the crimes laid to his charge, his counſel had thought it their duty to plead the obvious defence of preſcription, in bar of this proſecution:—That, in a period of twenty-five years, which had elapſed between the death of John Stewart, whom the priſoner was accuſed of having murdered, and his commitment, in order to ſtand trial, he had reſided conſtantly in Scotland, and chiefly in Aberdeenſhire, the theatre of the alledged crime; that he had publicly carried on buſineſs, in an honeſt and induſtrious manner, and with an unexceptionable character; and that the change of his name, and place of abode, was owing to the attempts of a recruiting officer to trepan him as a ſoldier, which induced him to lay aſide the name of Macgregor, which was proſcribed by law, and to aſſume that of Grant.

Upon the point of law, it was argued, that a vicennial preſcription of crimes was an eſtabliſhed doctrine of the Roman law; and, in ſupport of it, ſeveral texts from the Corpus Juris Civilis, and other authorities, were quoted; particularly, Cod. lib. 9. tit. 22. l. 12.; lib. 1. tit. 7. l. 4. digeſt.; lib. 44. tit. 3. l. 13.; lib. 49. tit. 14. l. 1. § 4.; lib. 48. tit. 17. l. 3.; lib. 48. tit. 16. l. 11; and Mattheus, Tit. de Praeſcriptione Temporis; Voet. Tit. de Diverſis et Temporalibus Praeſcriptionibus, § 6.; Cujacius, vol. 4. col. 1338.; Heineccius ad Pandectas, lib. 44. tit. 3. § 370. &c. &c. It was maintained that the civil law was one of the fountains of our juriſprudence, and, in reality, a part of

of it *, where our own ſtatutes, cuſtoms, and the deciſions of our judges, are ſilent. And the authority of our commentators on the Scots law, particularly of Sir George Mackenzie, and of Mr Erſkine, was quoted in ſupport of the preſcription of crimes. The opinion of Fountainhall was ſaid to refer to a caſe of murder which had happened only eighteen years before, where, conſequently, the vicennial preſcription could not take place; and that even Fountainhall admitted, that lapſe of years might in ſome meaſure expiate a crime. 1773

As to the liſt of caſes given in by the Lord Advocate, where priſoners were proſecuted at the diſtance of more than twenty years from their offence, it was obſerved, that moſt of theſe were for witchcraft, which, like apoſtacy, is a *crimen continuum;* for it was held,—*once a witch, always a witch.* Beſides, that, in the preſcription of crimes, the ſame rule muſt take place as in the preſcription of accompts, viz. that it runs not from the firſt, but from the laſt article. As to the caſe of inceſt quoted for the proſecutor, where a man was hanged, at the diſtance of thirty-five years, for lying with his wife's daughter †, it was anſwered, that no counſel appeared for the priſoner; that no defence was offered for him; and that it happened in times worthy of ſuch a

 ſentence,

* To ſee this publicly contradicted muſt excite a ſmile in a perſon who has undergone a profeſſional education for the Scottiſh bar, or who is in the leaſt acquainted with the proceedings of our courts of juſtice. Before a young gentleman is admitted to the bar, he undergoes a ſtrict examination upon the civil law: And it is only within theſe forty years, or thereabout, that it was thought neceſſary to ordain a candidate for the profeſſion of a lawyer to undergo an examination upon the Scots law, properly ſo called.—The information for his Majeſty's Advocate againſt the Glaſgow rioters, A. D. 1725, has theſe words: 'By the Roman law, '*which is the common law of this kingdom;*' Records of Juſticiary, 25th September, 1725.

† See Index, article *Inceſt.*

1773 sentence, viz. those of fanaticism and usurpation. The counsel for the prisoner also referred to the case of Macleod * of Assint as a precedent in support of the prescription of crimes. The case was this; Macleod was tried on the 2d of February 1674, upon an indictment charging him with several treasonable crimes; viz. *1st*, With betraying, under trust, the late Marquiss of Montrose, his Majesty's Commissioner, and Lieutenant-General, and delivering him a prisoner to the rebels in A. D. 1649, who murdered him; for which the said Macleod of Assint received a reward of 400 bolls of meal. *2d*, With having, in A. D. 1654, assisted the English rebels commanded by General Morgan in burning and plundering the north. *3d*, With having, in A. D. 1669, exacted arbitrary taxations upon all shipping that came to anchor in any of the creeks belonging to the prisoner. And, *4to*, With having, in A. D. 1670, fortified and garrisoned his house of Ardbreck, and defended the same against the sheriff of Sutherland, who had his Majesty's warrant to eject him. Now, although the two first articles in the indictment are by much the deepest of the crimes with which Macleod of Assint was charged, his Majesty's Advocate declared, 'he did not insist upon the two first crimes 'libelled *but only as aggravations*.' Which the prisoner's counsel alledged could proceed alone from the crimes being prescribed.

The counsel for the prisoner likewise argued, that the admitting of a perpetual right of actions for crimes was inexpedient in every country; and, considering the nature of our criminal law, was peculiarly so in Scotland. It was alledged, that the design of punishments respected either the criminal or the public. With respect to the criminal, the purpose is to produce an amendment in his life and manners, or to cut him off from society, if the

* Records of Justiciary, February 2. 1674.

the enormity of his crime indicates such depravity that he may 1773
be looked on as incorrigible. But this cannot be answered by prosecuting a criminal after the years of prescription; for, if the seeds of guilt had not been eradicated from the mind, the various agitations to which a man is exposed from the occurrences of twenty years, must have made them sprout forth into fresh outrages against society. And, if the revenge of a private prosecutor demanded an expiation of guilt, what more terrible punishment, than that a criminal should live under the continual apprehensions of an ignominious death for a period of twenty years?—To drag a man thus situated to the scaffold, after a regular, industrious, and exemplary life, would as little suit the end of punishment which respected the public, as that which respected the criminal: For, with regard to the public, the end of punishment is to deter others from committing the like offence; but no good impression can be stamped upon the public, when their compassion for the criminal exceeds their horror at his crime, which must be the case when the memory of an offence is obliterated *, while, at the same time, the inoffensive, perhaps exemplary, conduct of the sufferer, is consistent with the knowledge

* Within these four or five years, a person returned to this country with an affluent fortune and respectable character, who, in an early period of life, absconded on account of his being concerned in the mob which hanged Porteous, A. D. 1736. What good purpose could it serve to indict this man capitally upon his return? (For an account of the Porteous mob, see Arnot's History of Edinburgh, p. 206.) Or what good purpose could it *now serve* to bring a prosecution against the rioters who, in A. D. 1779, burned the Popish chapel, committed house-breaking and robbery upon the priest, and assaulted the houses of many respectable citizens whom they supposed to befriend the Popish bill? Yet, had not the public prosecutor, from whatever motives of lenity or timidity, omitted to raise a prosecution for hanging the ring-leaders in this scene of tumult and devastation, *I firmly believe that the burning of London, A. D. 1780, would not have happened.* At least it is certain, that a popular orator, in haranguing his friends previous to this dreadful event, would not have had such cause to boast of *the gallant example of the Scots*.

1773 ledge of thoſe who behold his ſufferings. The laws which relate to property, wiſely regarding the ſecurity of our fortune againſt obſolete and endleſs claims, have eſtabliſhed a preſcription of every ſpecies of *civil action;* much more ought the laws to ſecure the peace of mankind, by limiting the right of *criminal action*, which at one blow may complete the threefold ruin of fortune, of life, and of fame. Beſides, a perſon ſuſpected of an offence may lie under great diſadvantages by the proſecutor's having an unlimited power of chooſing his time of action. He may bring it at a period when there is ſuch a ſpirit of violence in a country againſt a man, a party, or a crime, that, in the ferment of peoples minds, accuſation may be equal to conviction: And, beſides, in a long lapſe of time, the death or abſence of witneſſes may deprive a priſoner of his plea of *alibi*, provocation, ſelf-defence, that the deceaſed died a natural death, &c. &c.

If preſcription of crimes be expedient in general, it is ſo in a ſpecial manner in Scotland, whether we regard the powers of the proſecutors, or the nature of our laws. As to the former, the Lord Advocate may proſecute any perſon for any crime he chooſes: His Lordſhip is not reſtrained by the neceſſity of a grand jury's finding a bill; nor is a coroners inqueſt called upon the body of a perſon deceaſed to aſcertain the cauſe of a ſudden and ſuſpicious death.—It is wretched argument indeed, to alledge that this power is not dangerous, if reſtrained by no limits of preſcription, becauſe of the benignity of the Prince, or the perſonal character of the gentlemen who are appointed to the important office of Lord Advocate.—Salutary laws are not made in tyrannical times, but in a mild and equitable reign. Thus the opportunity of guarding againſt oppreſſion, in general, occurs, when there is the leaſt proſpect of oppreſſion being at hand.—But, however ſafe we may be from oppreſſive proſecutions at the

inſtance

instance of his Majesty's Advocate, what security have we but the lapse of time, against the invidious actions of private prosecutors, who, instigated by malice, or with a view to extortion, might call upon a man to answer for the *sins of his youth*, after he had become a grave and respectable citizen, and the father of a numerous family? For prosecution is granted, in its utmost latitude, either to the party injured, or to his nearest heirs; nor can the Lord Advocate with-hold his *concurrence* *.—Should connubial love be turned into deadly rancour, either the husband or the wife may prosecute the other for adultery *to the effect of a capital punishment* †. 1773

The healing hand of prescription is no less expedient in relation to the nature of our laws. To say what is a capital crime by the law of Scotland, and what not; or, at least, what has been, or has not been so, within these hundred years, is no easy matter ‡. Our indictments are laid sometimes on the statute, sometimes on the common, and sometimes on the Mosaick law alone. Many of our penal statutes are wild, tyrannical, and incorrect; and in few of them anterior to the present century, is there a limitation of the time of raising prosecutions upon them.—Happily the Scottish treason laws are now abolished, and those of England substituted in their room. Prosecutions for witchcraft too are driven to the realms of night. But still the laws against Popery, blasphemy, duelling, adultery, and suicide §, may be used

* Consent to the prosecution.

† See a remarkable trial of this sort *infra*. Index, Adultery, Haitly against Fraser.

‡ If the reader is already satisfied of this from some of the trials for treason and murder presented above, he will not see occasion to alter his opinion, from a perusal of the subsequent part of this work.

§ As the penal consequences of this crime can only take place after death, if the right of prosecuting for the personal estate of the deceased be not limited by prescription, it must *continue for ever*.

1773 ufed as ample engines of oppreffion.—Befides, there truly is no reafon why either the public or private profecutor fhould be indulged with an unlimited time of bringing his action. If the accufed abfconds, his flight will not cut off the right of profecution; for, if he does not appear in Court to anfwer to the indictment which may be brought againft him, the fentence of outlawry, which paffes of courfe, will preferve to the profecutor a perpetual right of action; therefore, the profecutor may blame his own negligence, if he has loft his right of profecution, by omitting to obtain a fentence of outlawry againft the accufed. And, if no fymptoms, no fufpicion of guilt, have been difcovered in a period of *twenty years*, or what is the fame, none that can juftify the raifing a profecution, it is better that the profecutor fhould then be deprived of his right of action, than that a perfon fhould be called upon to defend himfelf againft a capital indictment, at any diftance of time, however fo remote.

The Lords having confidered the informations for his Majefty's Advocate, and for the prifoner, pronounced this interlocutor: 'In refpect it does not appear that any fentence of fugitation paffed againft the pannel, they therefore fuftain the defence, and difmifs the indictment and the pannel from the bar.'

I remember to have liftened with attention to the pleadings in this caufe, and to have looked with anxiety for their Lordfhips judgment. The fatisfaction I felt when it was pronounced, is not abated upon reflection. This judgment, indeed, is of a very different caft from the general ftile of the decifions of this Court in the laft century.—It is a juft, but trite remark, that a wife fyftem of laws tends to humanize manners; but it is no lefs true, that liberality of fentiment, and gentlenefs of manners, humanize the rigorous doctrines and difcipline of the law.

OF TUMULT WITHIN BURGH.

David Mowbray ſhoemaker, for exciting a tumult in the city of Edinburgh, and reſcuing a baker whom the hangman was whipping through the Canongate, by order of the Magiſtrates.

THE preamble to one of our old ſtatutes emphatically deſcribes the diſorders which prevailed in this country from one of the worſt of political evils, *the relaxed arm of the civil magiſtrate.* 'Forſameikle (ſays the ſtatute) as the overſight and 'negligence of the civil magiſtrates, and judges ordinar within 'this realm, in putting of decreets to execution, puniſhing of 'malefactours and rebells, and utherwiſe uſing of their offices, 'as becummis, partelie for regard, and feare of ſtrang pairties, 'and hazard of their own lives; and pairtly throw want of ſufficient preparation for that effect, is the original and principale 'cauſe quhair fra * the great confuſion and diſordour of this 'lande in all eſtaites proceedis †.' Therefore by this, and other acts of parliament, it is ſtatuted, that the raiſing or aſſembling within borough, conventions of the people, without ſpecial licenſe of the Sovereign, or authority from the magiſtrates of the borough; eſpecially, if ſuch people ſhould preſume to arm themſelves, 1686

* From which.

† Mary, Parl. 9. c. 83.; James VI. Parl. 13. c. 184. Parl. 18. c. 17.

1686 ſelves, to diſplay banners, *to beat the drum*, or ſound the trumpet, or to make uſe of other warlike inſtruments whatever, it is ſtatuted, that perſons thus offending ſhall ſuffer the pain of death. It is further enacted, that, whoever ſhall diſobey and reſiſt the authority of the *Magiſtrates of Edinburgh*, or their officers, in the execution of their duty, ſhall ſuffer the like penalty.

The priſoner was tried on theſe ſtatutes.—On Sunday the 31ſt of January 1686, a rabble of journeymen and apprentices in Edinburgh, leagued with ſome ſtudents at the Univerſity, among whom fanatical principles had of late made an alarming progreſs †, aſſembled for the purpoſe of inſulting and interrupting thoſe of the Popiſh perſuaſion in the exerciſe of their religion. Their indignities were directed at the Chancellor's Lady, and other perſons of that faith, when diſmiſſing from their place of worſhip. The mob, many of which were armed, pelted the members of that congregation with ſtones and dirt, rifled ſome of them of their clothes, and maltreated them in their perſons; and then proceeded to the High Street of Edinburgh, where, with iron-bars, and other inſtruments, they attempted to break open the houſes of ſeveral of the inhabitants, and did reſiſt the Magiſtrates of Edinburgh, and the

† Upon Chriſtmas-day, A. D. 1680, the Magiſtrates of Edinburgh, from that decent reſpect which was due to the Duke of York, who was then in the city, interrupted the ſtudents in their ſolemn proceſſion of a Pope-burning; ſo that they were fain to burn him poſt-haſte in an obſcure part of the town. On the 11th of the enſuing month of January, the houſe of Prieſtfield, the ſeat of Sir James Dick, Lord Provoſt of Edinburgh, was willfully ſet on fire, and with all the furniture, burnt to the ground, not without the moſt pregnant ſuſpicion that it was ſet on fire by ſome ſtudents at the Univerſity. Arnot's Hiſt. of Edinburgh, p. 392.

the Commander in Chief of his Majesty's forces, and the troops under their command, and wounded several of the soldiers who were assembled in order to disperse the mob. 1686

The military having dispersed the mob, and several of the rioters being apprehended, the magistrates, next forenoon, ordained one Grieve, a baker, an active person in the tumult, to be instantly whipped through the city by the common executioner. To save the delinquent from undergoing the punishment awarded by the magistrates, the prisoner, Mowbray, and his associates, collected a mob afresh, rescued the baker from the town officers and the executioner, and carried him off in triumph.

The prisoner was served with an indictment, charging him with having transgressed the statutes already specified, by being engaged in this tumult; and his Majesty's Advocate declared, that he restricted the libel against the prisoner to his 'accession 'to the tumult on Monday in the forenoon, in rescuing the baker from the execution of justice.' The Lords found the libel, as restricted, relevant to infer the pain of death.

THE PROOF.

The prisoner judicially declared, that he was present at the tumult libelled, and assisted in rescuing the baker from the town-officers. He craved God and the King's pardon for his offence, declared that he was heartily sorry for it, and came in the King's will.

George Macfarlane, one of the town-officers of Edinburgh, deposed, That, on Monday last, as he was employed by the magistrates to execute the sentence against Grieve, the prisoner was

1686 one of the mob which rescued him. The deponent called out to the prisoner to be gone; but this he refused, saying, 'he would 'take part with the *trades;*' and, upon Grieve's being rescued from the town officers, the deponent saw the prisoner take Grieve by the hand, and march off with him amidst the mob.

John Thomson, town-officer, deposed, That, on Monday last, he saw the prisoner amidst the mob which threw down the town officers, and rescued the baker, and heard him declare he would stand by the *trades.*—Two more witnesses swore to the same purpose.

The jury unanimously found the prisoner's accession to the tumult, in rescuing the baker from the execution of justice, proved by his judicial confession.—The Court adjudged the prisoner * to be taken to the Cross of Edinburgh on Wednesday next, the 10th of February, and to be hanged on a gibbet till he be dead. It appears that the Privy Council granted the prisoner a reprieve till a short day. Whether he got any farther respite, or was then hanged, is uncertain, as the records of Privy Council for A. D. 1686 are missing. One Keith, a fencing-master, was tried on the 26th of that month for accession to the same tumult, was convicted, and was hanged at the Cross of Edinburgh on the 5th of March.

The discipline manifested in this trial, conviction, and execution,

* Fountainhall says two persons were tried this day for being concerned in this tumult; but he does not mention their names. The records of justiciary testify, that no person was tried or outlawed on account of this tumult, at this time, except Mowbray, nor at any other time that I know of, except on the 26th of that same month, when Keith, whose trial is also mentioned by Fountainhall, was tried and convicted. See Fountainhall's Decisions, vol. 1. p. 401. 407.

tion, when compared with a recent occurrence, impreſſes us with 1686
no very favourable idea of the preſent times.

The tumultuous diſpoſition of the rabble *, impatient at the price of grain after a ſucceſſion of bad crops, had broke forth in a variety of outrage that required an exemplary and deciſive check. William Spence, a mattroſs in the ſecond battallion of artillery, was proſecuted by his Majeſty's Advocate before the High Court of Juſticiary at Edinburgh, on the 13th of December 1784. He was charged in the indictment with being an active perſon in aſſembling a mob, on the 7th of June preceding, at the village of Ford, about ten miles from Edinburgh, for the declared purpoſe of demoliſhing a diſtillery †;—with exciting a number of colliers to join the mob;—with breaking into the diſtillery, and actually ſetting fire to one or more of the buildings with his own hands ‡.—As the evidence in this trial is not recorded, I have it not in my power to ſpeak from my own knowledge as to the evidence of Spence's guilt: But, notwithſtanding that the crime was *willful fire-raiſing;* notwithſtanding I have been informed by every perſon I have converſed with who was preſent at the trial, that the evidence of his guilt was complete, 'the jury, by a great plurality of voices, found the pannel *Not* '*Guilty.*'

* In the proſpectus of this work which I publiſhed, I propoſed to lay before the public the trial of the malt-tax rioters for pillaging and demoliſhing the houſe of Mr Campbell of Shawfield, A. D. 1725; but, upon fully examining and conſidering the charge againſt the priſoners, the informations for his Majeſty's Advocate, and them, the interlocutors of the Court of Juſticiary upon the defences ſtated for the priſoners, the proof led in the cauſe, the verdict of the jury, and the judgment of the Court; I ſay, upon a conſideration of the whole circumſtances, this trial, according to my ideas, is in many reſpects improper for publication.

† This diſtillery was burnt to the ground. The damage was eſtimated at L. 7000.

‡ Records of Juſticiary, December 13. 1784.

1686 The conſequences to a country, if juries will be ſo prepoſterous as to acquit a priſoner contrary to evidence, for a crime ſo dangerous to ſociety, are too obvious to require to be enlarged upon. I muſt, however, take the liberty to obſerve, that it appears requiſite that the mode of ſummoning juries in this city ſhould undergo ſome alterations. The number of trials by jury in Edinburgh, before the Courts of Juſticiary, Exchequer, &c. is conſiderable, and the jurymen are generally choſen from among the merchants, ſhopkeepers, and tradeſmen. Thoſe who follow the profeſſion of the law * are never called. The landed gentlemen, or freeholders, of the three Lothians, are ſeldom or never ſummoned, except in the trial of a *landed* man. The inhabitants of the town of Leith, although men of conſequence in the mercantile line, are ſeldom called but in trials which have ſome relation to maritime affairs. A practice has alſo crept in of not ſummoning upon a jury, gentlemen who have preferred a reſidence in Edinburgh to living at their eſtates in the country, and who, conſequently, cannot be called to attend the circuits in their reſpective diſtricts. By theſe means, the rotation of duty of ſitting upon jury comes very frequent upon that claſs of people which are in uſe to be called, and the duty impoſed upon them is therefore *heavy and unequal.* By theſe means, alſo, *improper perſons* are ſometimes ſummoned to ſit in jury upon a priſoner: For this important article in the adminiſtration of juſtice is generally left to inferior clerks.—It is perfectly well known that there is a deſcription of men in this city, of whom it could not be expected that any power of teſtimony would lead them to convict a priſoner of certain crimes †, yet who (it is believed) would liſten with gloomy

* The Faculty of Advocates claim an exemption; and thoſe who practiſe at the bar are undoubtedly entitled to it.

† I humbly think, that, in trials of difficulty

gloomy joy to criminal accusations of a nature that no Lord Advocate would now dream of raising. By extending, therefore, the classes of people from which our jurymen are to be chosen, the burthen will become the easier upon those who discharge this important trust, and the danger will be avoided of having crimes of the most pernicious tendency tried by a jury of men illiberal in their sentiments, and violent in their prejudices, who, in the trial of a prisoner, consider more *the nature of the crime*, *than the strength of the evidence*. 1686

I have heard it urged as an apology for the jury who sat upon Spence, in having given such a verdict, that they would have pronounced a different one, had it not been, *that*, *of late*, *too little respect has been paid to the opinions of jurymen when recommending a convict to mercy*. This, I know, alludes to the case of James Andrew, who was convicted of robbery, and condemned; and who, notwithstanding that the jury unanimously recommended him to mercy, was executed in terms of the sentence, upon the 4th of February 1784. As this has been a topic of conversation, and with some, of animadversion, I shall state what *I know* concerning it.—The jury gave a recommendation in favour of the prisoner, setting forth their reasons for so doing: The Court made a report of a very different nature. As I have only seen the former,

difficulty and importance, the proper officer should have it in his power to send up to the Court a list of forty-five men whom he thinks intelligent and independent; and that, when the judges name the fifteen who are to sit upon the jury, the prisoner should have it in his power to challenge a third of them without any cause assigned.

1686 former, I cannot form, far lefs can I prefume to deliver an opinion between thefe oppofite fentiments of the Court and jury. My purpofe then is but to fhow, that the cafe was accurately and fairly laid before his Majefty. It appears from Lord Sydney's letter to the Lord Advocate, of the 21ft January 1784, that Lord Kennet's 'report upon the cafe, the minutes of the 'trial, and the evidence given thereupon, together with the re-'commendation of the jury,' were laid before the King, who 'having maturely confidered the cafe of the convict, does not 'fee fufficient grounds for extending his royal mercy to him.' And Mr Chalmers, the folicitor at London who correfponded with Mr Bruce, the agent for the convict, writes to him thus: The under fecretary '*fhewed me all the papers that had been 'tranfmitted from Scotland, and laid before the King*. Lord Ken-'net's report ftates very accurately the circumftances of the cafe, 'and mentions the recommendation of the jury, and the grounds 'they went upon; but adds, that he and his brethren did not 'think Andrew a proper object of the royal mercy; giving the 'reafons, and *fhewing, that the arguments of the jury were not 'folid, in very diftinct clear terms*.'—As the jury had a right to give a *recommendation*, fo the judges were entitled to make a *report*; and no ground of complaint can arife from this cafe, unlefs it fhall pleafe jurymen to alledge that his Majefty is not at liberty to act according to his own judgment, in the exercife of the moft fublime part of his prerogative.

But, even fuppofing that improper means had been ufed to with-hold the royal mercy from Andrew, I cannot admit that this is any apology for the jury which fat upon Spence the matrofs, having pronounced a verdict finding him *not guilty;* for I confider him to have been a moft unfit object of mercy; becaufe, from the recent and repeated outrages of the rabble, and

and inſtances of timidity in the civil magiſtrate, none of the 1686
crimes which ariſe from the avarice or malignity of *an individual*, are ſo hurtful to ſociety as this *contagious* ſpirit of fire-raiſing and tumult. And this priſoner, Spence, was not only reckoned by the *ſpectators* of his trial, to have been proved guilty as a ringleader in the tumult, but alſo as having ſet fire to the diſtillery with his own hands.—Lord Kennet made the above report, relative to Andrew, as Preſident of the Court of Juſticiary, in abſence of the Lord Juſtice Clerk. His acuteneſs of apprehenſion, his ſolidity of judgment, and his accuracy in buſineſs, were acknowledged when he was alive; and are now *ſealed* by the united regret of the Bench, the Bar, and the Public.

OF PIRACY.

Trial of Captain Thomas Green, Commander of the Worcester, a ship belonging to the English East-India Company, and of fourteen of his crew, for Piracy and Murder, committed on a ship and its crew on the coast of Malabar.

1705 THE opposite lights in which the parliaments of England and Scotland viewed the institution of the Indian and African Company, in the latter of these kingdoms, and the ferment which arose in Scotland upon the ruin of this Company, and the loss of its settlements, have already been mentioned*. The contests between the English and Scottish Companies, trading to the East-Indies, excited further animosities between these nations. The Annandale, a ship belonging to the African Company, had been seized in the Downs by the English East India Company, and the pressing instances with which the former solicited its restitution being disregarded, they procured an order from Government in Scotland, for seizing, by way of reprisal, this vessel the Worcester, which had arrived in the Forth. The vessel was conducted to the harbour of Burntisland. She was detained there in virtue of a precept from the Scottish Court of Admiralty; and an action was brought before that Court, at the instance of the African Company, for having the ship declared a lawful prize, on account of the East India Company's unjustly seizing and confiscating the Annandale.

While

* See the Trial of Thomson and Auchmouty, p. 91.

While the Worcester lay thus under an embargo, the unguarded speeches of the crew, in their cups or their quarrels, led them to be suspected of the crimes of piracy and murder committed upon a vessel and its crew in the East Indies, belonging, as was supposed, to one Drummond a Scotsman*. The suspicions thus entertained were the cause of a precognition being taken of the affair, and the presumptions of guilt arising from this precognition, were so strong as to give occasion to the following trial. 1705

On the 13th of February 1705, an act of the Scottish Privy Council was passed, authorising a prosecution against Captain Green and his crew, before the Court of Admiralty, and ordaining the Lord Chancellor to make application to her Majesty for a pardon to Charles May surgeon, Antonio Ferdinando cook's-mate, Antonio Francisco the Captain's man, George Haines steward, George Glen quarter-master, and Alexander Taylor foremast man.—The Privy Council, at the same time, appointed the Earl of Loudon, Lord Belhaven, Sir Robert Dundas Lord Arniston, Sir John Home of Blackadder, and John Cockburn younger of Ormeston, assessors to Mr Graham the Judge Admiral.

The prisoners were brought to the bar on the 5th of March 1705. It was charged against them in the indictment, that, in the months of February, March, April, or May 1703, they did meet with another ship bearing a red flag, and manned with Englishmen, or Scotsmen, on the coast of Malabar, nigh Calicut:

* Records of Admiralty, 5th, 13th, 14th, 16th, 21st March 1705. De Foe's Hist. of the Union, p. 46. Trial of Captain Thomas Green, Edinburgh, printed by Thomas Anderson, A. D. 1705.

1705 licut:—That they did, without any lawful warrant, or juſt cauſe, attack the ſaid ſhip in a hoſtile manner, with guns and otherwiſe, boarded her, killed the men, and threw them overboard, took the goods from on board of her, and lodged them in the Worceſter; and then diſpoſed of the veſſel thus piratically captured to one *Coge Commodo*. The indictment alſo contains a minute narrative of the circumſtances from which the priſoner's guilt was inferred. But it were ſuperfluous to inſert them here, as they will appear with greater propriety in the evidence led in ſupport of this proſecution.

A formidable band of counſel appeared both for the proſecutor and the priſoners; and the following objections to the relevancy of the indictment were ſtated, partly in written informations, and partly in pleadings at the bar.

It was pled for the priſoners, that the crimes libelled being alledged to have been committed by Engliſhmen on the coaſt of Malabar, this Court had no juriſdiction; and the priſoners ought to be remitted for trial to the proper courts of law in England. 2*do*, That Henry Keigle, the ſhip's carpenter, and certain others of the crew who were indicted along with him, being part of Captain Green's crew, and under his command, could not be put upon their trial, till the Captain himſelf was previouſly tried. 3*dly*, That Captain Green could not be tried till John Reynolds, and certain others of the priſoners who had received an indictment, ſhould have undergone a previous trial; becauſe he the Captain had cited them as exculpatory witneſſes; and, in caſe of their acquittal, was entitled to their evidence in his behalf: Otherwiſe the author of a groundleſs and invidious proſecution, while he raiſed an indictment againſt the principal offender, by alſo comprehending, in the indictment, the whole exculpatory

witneſſes

witnesses as accomplices, might deprive a prisoner of the evidence in his defence. *4to*, That the libel was too general and indefinite, as it did not specify the name of the ship alledged to have been pirated, the designation of the Captain, the names of the persons said to have been murdered, nor any circumstances by which the ship in question might be specially distinguished: Yet it is requisite that all these be set forth in a criminal indictment, not only in point of form, but of material justice; for otherwise a prisoner might be precluded of many solid defences, such as, that the ship said to have been pirated, was in an opposite quarter of the globe; that she still remained in possession of her lawful owners; that the persons alledged to have been murdered were still alive, &c. That it was the more necessary that the prosecutor should be obliged to specify the ship particularly, as the prisoner, Captain Green, having a commission under the Great Seal of England, impowering him to act in hostility against pirates, might actually have taken or destroyed a ship, and killed the men, without having done any thing contrary to law. *5to*, That the indictment was laid in such manner, as to show that the prosecutor meant to establish the prisoner's guilt, not by positive testimony, but circumstantial evidence; and that the circumstances charged in the indictment were not such as necessarily to infer a conclusion of the prisoner's guilt. And, indeed, to hold a crime to be proved by circumstantial evidence, was extremely hazardous, and what many lawyers deemed illegal.

1705

To these objections to the relevancy of the indictment, it was replied by the counsel for the prosecution, *1mo*, That the jurisdiction of the Court was established by act 1681, cap. 16. which declares, that the High Court of Admiralty has the sole jurisdiction, in all maritime causes, civil and criminal, and against all

1705 persons foreign or domestic.—And, independent of this statute, this Court must possess a jurisdiction over the prisoners in the crime of piracy; for, if pirates are not liable to be tried in the country where they are apprehended, this class, the most lawless and desperate of men, would escape without punishment, or even trial, unless they happened to be apprehended in the country of which they were natives, or where the crime was committed. *2do*, and *3tio*, That the plea which had been urged in behalf of some of the prisoners, that they could not be tried till their Captain had undergone a previous trial; and the Captain's plea, on the other hand, that he could not be tried before certain of his crew, was a notable example of arguing in a circle; and, by admitting such objections as this, where more than one person was accused in an indictment, criminal process might be altogether stopped: That such of the prisoners as were of Captain Green's crew, could not plead the authority of their Captain, to exculpate them from the charge in this indictment, for no warrant could authorise piracy; and the prisoners were all indicted as *socii criminis*.—And although, if a prosecutor should adopt a measure so extraordinary, so villainous, as to comprehend both the alledged perpetrators, and the exculpatory witnesses, in one indictment, with a view to preclude the accused of their defences, this might entitle the alledged perpetrators to insist upon those of the defenders whom they were to summon as witnesses being previously tried; yet it behoved the perpetrators to specify a probable ground of the innocence of these intended witnesses; but the prisoner, Captain Green, had set forth no such ground of the innocence of those of his crew whom he proposed to adduce as evidence. *4to*, As to the objection of the libel being too general and indefinite, it was laid as specially as the circumstances of this remote crime would admit.—Piracy and murder were equally such, and alike punish-

able

able by the laws, whatever might be the names of the veſſel pirated, and the perſons murdered, or whatever nation they might belong to.—By admitting an oppoſite doctrine, it might be maintained, that a ſhip might be attacked and ſunk, and her crew murdered, in the *Road* * of Leith, before thouſands of ſpectators on the oppoſite ſhores; and yet, although the evidence of this act of violence was ſo notorious, it could not be the foundation of a trial, if the perpetrators ſhould have accompliſhed their villany ſo completely, as to have utterly deſtroyed the ſhip and her crew, and to have ſent them both to the bottom of the deep. Neither was it requiſite that the libel ſhould be more minute as to time and place. In a piracy committed in the Indian ocean, where the total deſtruction of the ſufferers rendered the proof of guilt extremely difficult, it was impoſſible to ſpecify the preciſe latitude of the ſhip, or the day of the month when the crime was committed. Indeed, the day and place of the commiſſion of a crime were not neceſſary to be ſpecified in an indictment, unleſs they were charged as aggravations of the guilt; ſuch as, that the crime was committed of a Sunday, or againſt a perſon in his own houſe; and, if a defender ſhould require that day and place be ſpecified, becauſe he means to prove an *alibi*, it muſt be upon condition that he admit the crime charged in the indictment to have been actually committed, although he, by reaſon of the *alibi*, can inſtruct, that he was not the perpetrator. And the commiſſion under the Great Seal of England, which Captain Green poſſeſſed, far from rendering a more ſpecial *condeſcendence* neceſſary, would, in the courſe of the trial, afford a ſtrong preſumption of the priſoner's guilt; for the commiſſion required, that the Captain ſhould keep a particular journal of any hoſtile attack he ſhould make upon any veſſel; and, 1705

by

* The place where veſſels ride at anchor off Leith harbour.

1705 by the journal produced by the prisoners, it did not appear that he had made any such attack.

The Court repelled the objections to their jurisdiction, and also the whole objections stated against the relevancy of the indictment; and found, that the same being proved, '*by clear and* '*plain evidence*, relevant to infer the pains of death and confiscation of moveables.'

THE PROOF.

Antonio Ferdinando, cook's-mate of the Worcester, a Black, deposed, that he believed in God, was born of Christian parents, and was himself a Christian:—That, about two years and a half ago, he came aboard the sloop belonging to Captain Green, the prisoner's ship, then on the Malabar coast, and entered into the service of Mr Loveday the purser. When sailing on that coast, he saw an engagement between the Worcester, her sloop on board of which the deponent was, and a ship manned with white men, speaking English, and bearing English colours; that is to say, colours of white, red, and black, such as the Worcester did bear. —Captain Green, Captain Madder the first mate, James Simpson the gunner, and others, to the number of about twenty men, manned the sloop. The sloop engaged the strange ship first, and the Worcester joined the engagement afterwards. It was a running fight of three days, and happened between Tellicherry and Callicut. On the third day, those in the sloop boarded the strange ship, took her crew from under the deck, killed them with hatchets, and threw them overboard; and the said prisoners, Green, Madder, and Simpson, were among those who boarded the strange ship and killed the men. The deponent believes, that the men so killed, and thrown over-board, were a-

bout

bout ten in number. There were but few goods in her; theſe were carried aboard the Worceſter, and conſiſted partly of China-root; and the veſſel thus captured was manned by ſome of the Worceſter's crew, carried to Callicoiloan, and there ſold for the ſervice of a Malabar King, to a man bearing a Malabar name, and whoſe ſervant was called *Coge Commodo.*—He knew not what men, or whether any belonging to the Worceſter or her ſloop were killed; but he the deponent was wounded in the arm, and now ſhows the wound in Court.—Captain Madder ſaid to the deponent, that, if ever he told any man, either white or black, of this engagement, he would throw the deponent over-board.—Depoſed, That, during the engagement, Reynolds, the ſecond mate, was aſhore at Callicoiloan, as the deponent believes.—This depoſition is ſubſcribed by the deponent in the Malabar character, and by Captain George Yeoman merchant in Dundee, his ſworn interpreter. 1705

Charles May ſurgeon to the Worceſter depoſed, That he ſailed with this ſhip from England. When the veſſel was on the Malabar coaſt, he was ſet aſhore at Ibeck, and went ſome miles up the country to Callicoiloan. About a fourtnight after, he heard firing at ſea; and meeting with Coge Commodo merchant, and Franciſco de Olivera interpreter to the Worceſter, who had come that day from Ibeck, he aſked them what meant the ſhooting? and they ſaid, that the Worceſter had gone out to ſea, and was fighting with another ſhip. Next morning the deponent went to the ſhore, where he ſaw the Worceſter riding at her former birth about four miles from the ſhore, and another veſſel riding at her ſtern. Soon after, the Worceſter's long boat came aſhore in great haſte; the deponent aſked the boats crew what had brought them aſhore, it not being uſual for boats to come over the bar, on account of the greatneſs of the ſurge? and they anſwered,

1752 ſwered, that Captain Madder had ſent them for a *pinguetta* * with water, *becauſe all their water had been ſpilled or ſtaved the night before.* The men told him they had brought in a ſhip with them, but he did not ſpeak to them in relation to any fight, for he made no ſtay, but returned immediately to Callicoiloan, where his patients were. About five or ſix days after, he went aboard the Worceſter for ſome medicines, and ſaw the deck lumbered with goods in cheſts and bales. He ſaid to Mr Madder, 'What 'have you got there; you are full of buſineſs?' upon which Mr Madder curſed him, 'and bid him go mind his plaſter box.' There was a ſhip then riding at the Worceſter's ſtern, which the deponent was afterwards informed was ſold to Coge Commodo. Some time after this the Worceſter's ſloop came down the coaſt, and Antonio Ferdinando, the preceding witneſs, was ſent aſhore to the deponent at Ibeck. He was wounded in the arm; the deponent took off the dreſſings; and the wound was a fracture, which appeared to have been occaſioned by a gun-ſhot. He aſked at Antonio who had dreſſed the wound and ſet his arm? and Antonio ſaid, that he had been ſet aſhore at Cochin, and dreſſed by a Dutch ſurgeon. Some time after, he went aboard the Worceſter and viſited Antonio, and the other perſons in the ſhip who ſtood in need of his aſſiſtance. A wounded man, called Mackay, and another called Cumming, came to him at the medicine cheſt. He aſked them how they came by their wounds? and Mr Madder hearing this, deſired the deponent to aſk no queſtions; and forbad the patients to anſwer him upon their peril. An altercation immediately took place between Mr Madder and the deponent, who told him, he had no command over the deponent. Madder replied, he would make his complaint to one who had; and an order was ſpeedily given for carrying the deponent

* A ſort of little boat.

deponent ashore, and as speedily executed. Deposed, That this happened in the months of January or February 1703. 1705

Antonio Francisco a Black, servant to the prisoner, Captain Green, deposed, That when he was aboard the Worcester on the Malabar coast, he heard the firing of guns from on board the Worcester, to the number of six, or thereabout. The deponent was at this time chained and nailed to the floor of the forecastle; he had been so for about ten days; and continued thus confined in all about two months. Two days after he heard the firing, he saw some goods brought aboard, which Antonio Ferdinando, a preceding witness, told him had been brought out of a ship they had taken. Ferdinando told him also, that ten of the crew of the taken ship were killed; and showed the deponent a plaster on his arm, saying, he had been wounded aboard the Worcester's sloop when she took the other vessel.

John Brown shipmaster in Leith deposed, That he went on board the Worcester, by order of the Lords of Privy Council, when the ship was unloaded, and saw the hatches, which were fast and sealed, opened. Few or none of the packed goods were numbered or marked, although it is customary for goods to be so; and he, the deponent, never received any goods but what were marked, so that he might know to whom they belonged. Being interrogated for the prisoners, he deposed, That this is customary whether there be a supercargo aboard or not; and whether the goods belong to ten men, or one man. Being farther interrogated for the prisoners, Whether it might be owing to the pepper being spoiled and heated, and the goods much damaged, that they wanted the mark? deposed, That, where the goods were damaged, the bales were rotten to pieces, but, where

1705 the goods were entire, the bales and packages wanted both number and mark.

Archibald Hodge, ſhipmaſter in Leith, depoſed, he was on board the Worceſter, when ſhe was rummaged by order of the Privy Council, and ſaw the goods unloaded. Moſt part of them wanted both number and mark, which is nowiſe common or regular in any ſhip the deponent has ever ſeen; but he never ſaw an Eaſt India ſhip unloaded before.

John Glen goldſmith, depoſed, That laſt ſummer, the ſecond day after the Worceſter came into Leith Road, he went aboard that ſhip.—When in the cabbin with Captain Madder and one Hammond, who is now in England, Madder took a ſeal out of his pocket, and aſked the deponent what he thought of the *Scots African and Indian Company's arms*, and put the ſeal in his hand. It was about the ſize of a half-crown piece, had a handle of lignum vitae; and there were engraved on it a St Andrews croſs, a dromedary, with a caſtle on its back, a ſhip, with a riſing ſun above the helmet, and two wild men for ſupporters.

James Wilkie taylor, depoſed, That, in October laſt, after Captain Green's ſhip was brought into Burntiſland harbour, the deponent went there with his mother, with a view to get intelligence concerning his brother, who had gone with Captain Drummond to the Eaſt-Indies. The deponent fell in company with the priſoner George Haines, at the houſe of Mrs Seton, and aſked him, Whether he had ſeen Captain Drummond in the courſe of his voyage? Haines fell in a paſſion, and ſaid, '*Damn* '*me, what have I to do with Captain Drummond*.' The deponent dropped the converſation; but, after they had drank a while, and he thought Haines in better humour, he aſked him,

If

If he had not heard of, or seen any Scottish ship in the East-Indies? Haines answered, *that, when they were upon the Malabar coast*, they were informed by a Dutch vessel, that one Captain Drummond, commander of a Scots ship, had turned pirate, upon which they had manned their sloop, and made themselves ready in case of an attack; but they did not see Captain Drummond. Deposed, That Haines added, he had in his custody when the Worcester was seized in Leith Road, what he would not have had to fall in the seizers hand for twice the value of the ship*; and that he had thrown it over-board after the ship was seized, adding, 'Let them seek it now at the bottom of 'the sea.' 1705

William Wood, a gunner of her Majesty's artillery, deposed, That the prisoner George Haines, John Henderson writer in Edinburgh, and the deponent, were in company together at Burntisland, and had drunk hard.—Haines fell into a melancholy fit, and Henderson inquiring the reason of it, Haines said, 'It is a wonder, that, since we did not sink at sea, that God 'does not make the ground open and swallow us up when we 'are come ashore, for the wickedness that has been committed 'during this last voyage on board of that old bitch,'—pointing to Captain Green's ship. After this, he went a walking in Burntisland Links with Haines; and the deponent happening to mention to him, that Captain Madder's uncle was burned in oil for attempting to burn the Dutch ships at Amsterdam, Haines answered, 'If what Captain Madder had done, during this last 'voyage, were as well known, he deserved as much as his uncle

 'had

* By a confession and declaration which Haines afterwards emitted, it appears, that this which he was so anxious lest it should fall in the prosecutors hands, was a private journal he had kept of the ship's proceedings.

1705 'had met with.'—John Henderſon writer in Edinburgh, depoſed conform to the preceding witneſs, in every thing ſave the converſation that paſſed between the ſaid witneſs, and Haines the priſoner, in Burntiſland Links.—Ann Seton, in Burntiſland, confirmed the preceding converſation, except that which happened between Haines and Wood in the Links.

Beſides theſe depoſitions, the proſecutor produced in Court Captain Green's journals, from which it appeared, that the moſt anxious and minute inſtructions had been given to Captain Green by his owners, that no letters ſhould paſs between them but in cypher, and that even theſe ſhould be addreſſed to a third perſon; and that, during the voyage, no letters whatever ſhould be ſent by any of his crew to England.

The jury returned the following verdict: 'They, by plurality 'of votes, find, That there is one clear witneſs as to the piracy, 'robbery, and murder, libelled, and that there are accumulative 'and concurring preſumptions proven for the piracy and rob'bery ſo libelled: But find, that John Reynolds, ſecond mate of 'the ſaid ſhip, was aſhore at the time of the action.' The Court, on the 21ſt of March, ſentenced Captain Green, and four of his crew, to be taken to the ſands of Leith on the 4th of April, and hanged till they be dead; four more of the crew to ſuffer in the ſame place on the 11th of April; and five more to meet the like fate on the 18th of that month; and they diſmiſſed John Reynolds from the bar.

As the factions into which Scotland was then divided about the depending treaty of Union, did each of them take up this cauſe as a matter of party, the faction which favoured the Union maintained

maintained the prisoners innocence, and on this ground follicited a pardon for them. The party, again, that opposed the Union, which was much more numerous, and fully more violent, held the evidence of the prisoners guilt as equal to demonstration, and resented the attempt to obtain a pardon for the prisoners with the highest indignation. Three of the convicts, Captain Green, Madder his first mate, and Simpson the gunner, suffered on the day appointed. The rest were reprived from time to time, and finally pardoned. Green and Madder, some days before their execution, published a paper which they called their last speech. In this they maintained their innocence, a circumstance which makes no impression upon me, when I consider, that not only the Queen could pardon, but the Scottish Privy Council could reprive them, and that they entertained hopes of pardon till the last hour of their lives.—On the other hand, three of the convicts, Linstead, Haines, and Bruckly, emitted, after sentence of death had passed upon them, judicial confessions and declarations, acknowledging that Captain Green and his crew were guilty of the piracy and murder libelled. And I must acknowledge, that I look upon this confession as entitled almost to as little credit as Captain Green's denial of guilt: For, as the latter built his hopes of pardon from the English faction, upon the declaration of his innocence, so the former might ground their expectations of mercy from the Scottish faction, upon flattering them, by confirming the guilt of Captain Green and his crew. 1705

John

John Maciver and Archibald Macallum, merchants in Greenock, for ſinking and caſting away of ſhips, and piratically relanding and ſelling their cargoes, after entry in the Cuſtomhouſe, for the purpoſe of defrauding the underwriters and the revenue.

1784 THE priſoners were proſecuted before the High Court of Admiralty, at the inſtance of Ilay Campbell, Eſq; his Majeſty's Advocate, and John Monro, Eſq; procurator-fiſcal of that court. The indictment ſets forth, That, by the common and ſtatute law of this realm, the willfully caſting away, ſinking, or otherwiſe deſtroying of ſhips, for the purpoſe of defrauding the underwriters, or the revenue, and piratically relanding and ſelling, or otherwiſe diſpoſing upon the cargoes of ſuch ſhips, after theſe had been entered in the Cuſtomhouſe for exportation, are crimes of a heinous nature, and ſeverely puniſhable *. Farther, That, by an act of King George I. an. 4to, cap. 12. and by Geo. I. an. 11mo, cap. 29. it is declared, that whoever ſhall deſtroy, or procure to be deſtroyed, the ſhip of which he is an owner, officer, or mariner, to the prejudice of any perſon who may have inſured the goods with which ſhe was loaded, or of any merchant who may have goods aboard, or that of any owner of ſuch ſhip, ſhall ſuffer, as in caſes of felony, without benefit of clergy: Yet, that the priſoners, upon one or other of the days of April, May, or June, 1781, being owners of the ſhip called the Endeavour, then in Greenock, did freight the veſſel for Halifax in Nova Scotia, loaded her with a variety of goods for the ſaid port, and inſured them at London and Glaſgow for a large ſum

* Records of Admiralty, 19th May, 14th, and 15th June 1784.

ſum upon the ſaid deſtined voyage: That the priſoners did form 1784
a deſign of relanding the ſaid goods in whole or in part, with a view to defraud the underwriters and the revenue; and, accordingly, did reland part of the ſaid goods before the veſſel left the Clyde: That the priſoners alſo formed an intention of deſtroying the ſhip, gave directions for that purpoſe to James Robertſon the maſter, and Neil Macallum the firſt mate; and prevailed upon them by money, good deeds, or promiſes, to accompliſh their wicked purpoſe. In conſequence of this combination, the maſter and mate bored holes in the bottom of the ſhip; and, upon her being taken by an American privateer in the courſe of the voyage, two holes were found in her bottom, the one plugged up, the other open, and every thing ready for the final completion of the priſoners purpoſe: Notwithſtanding all which, they ſought and recovered from the underwriters the ſums inſured on the ſhip, to the amount of ſeveral thouſand pounds.—The indictment alſo charged the priſoner, Archibald Macallum, with crimes of a ſimilar nature, in relation to a veſſel called the New York, bound for the ports of New York and Philadelphia. And, farther, that he did receive drawbacks and bounties upon certain goods which he had entered in the Cuſtomhouſe, as part of the cargo of the ſaid ſhip, for exportation, but which goods he did fraudulently reland, and diſpoſe of for his own uſe.

Counſel were heard at great length, and informations alſo were ordered upon the relevancy of the indictment.

It was contended in the information for the priſoners, that the acts 4th and 11th George I. upon which the indictment was laid, did not extend to Scotland.—Many acts of parliament, it was ſaid, have been paſſed ſince the Union, which neither were meant to extend, nor could be conſtrued to extend to this part of the

united

1784 united kingdom. This muſt be the caſe where an act is grafted upon ſtatutes paſſed in England before the Union, and where a mode of procedure was preſcribed inconſiſtent with the forms obſerved in Scotland. Such, however, is the caſe of the ſtatutes libelled on. They are a confirmation of ſundry acts paſſed in England, reſpecting the deſtruction of ſhips, from the act Charles II. an. 22. cap. 11. downwards; all of which acts relate to each other, and form a progreſſive chain of the ſtatutory law of that country. Further, the mode of trying offences againſt theſe laws preſcribed by act 11th, George I. cap. 29. is totally inconſiſtent with the forms eſtabliſhed in our Courts, which demonſtrates, that theſe laws were never meant to extend to Scotland.—Accordingly, in the caſe of Lampro, A. D. 1751, a ſolemn deciſion was pronounced by the Judge Admiral, after the moſt mature deliberation, finding, that the ſtatutes 4th and 11th of George I. did not extend to Scotland: And the juſtice and propriety of this deciſion is confirmed by a ſubſequent act of Parliament, viz. George II. an. 26. cap. 19. 'for enforcing 'the laws againſt perſons who ſhall ſteal or detain ſhip-wrecked 'goods.' In this ſtatute, which relates to the 4th of George I. founded upon in this indictment, it is enacted, that the ſame ſhall, in all things, remain in full force, ſave only in ſo far as it is altered by the preſent act, '*provided, that nothing in this* '*act contained, ſhall extend, or be conſtrued, to that part of Great* '*Britain called Scotland.*'—The priſoners further maintained, that, ſuppoſing theſe ſtatutes of 4th and 11th of George I. to extend to Scotland, the Judge Admiral has no juriſdiction to try any offence againſt them; for that ſuch muſt be tried by commiſſion of oyer and terminer here, in the ſame manner as in England.

It

It was next argued, that the facts charged against the prisoners, relative to the brigantine the Endeavour, were not relevant to infer even an arbitrary punishment against them. The libel itself did only charge the prisoners with an intention to cast away the ship; it was admitted, that the ship was not cast away; and an intention to commit iniquity is not a crime at common law, according to the well known brocard, '*Cogitationis poenam in foro nemo patitur.*' 1784

In the information for his Majesty's Advocate, it was observed, that it would be matter of just regret, if the law of this country were so defective, that the perpetrators of such dangerous and foul crimes as those charged against the prisoners, could not be brought to punishment. By this alone, it was maintained, a repetition of such crimes could be prevented, and the honest merchant be established in the benefit of insurance; which he was in no small hazard of losing, by reason of the reiterated frauds of the prisoners and their associates, having excited a general suspicion and alarm in the underwriters, as to the fate of every vessel navigated from the Clyde.

Many statutes, no doubt, had been enacted since the Union, which did not extend to Scotland. But it was the province of judges to determine whether an act founded upon before them was general, or confined to a particular part of the united kingdom, by attending, 1*mo*, To the purpose of the statute; 2*do*, To the words in the enacting clauses.—The purpose, then, of this statute, is to prevent the willful destroying of ships, to the prejudice of underwriters or merchants. This surely is no less immoral, no less pernicious on the north than the south of the Tweed. To say that the Legislature meant only to protect England against this crime, is to accuse the counsels of Parliament

 of

1784 of the extremity of caprice.—But the caprice of ſo partial a law would be no leſs remarkable than its blindneſs and abſurdity; for the Engliſh are truly alike expoſed to the conſequences of this crime, whether committed in the Clyde, or in the Severne. Of this no ſtronger teſtimony can be afforded, than the facts which gave riſe to this trial; the number of veſſels which have been fraudulently deſtroyed by the priſoners and their aſſociates* were indiſcriminately inſured at Glaſgow and Edinburgh, at Liverpool and London.

As to the words of the ſtatute, they are altogether repugnant to the priſoners plea of its being limited to England. It is intituled, 'An act for enforcing and making perpetual an act of 'the twelfth year of her late Majeſty, intituled, An act for the 'preſerving of all ſuch ſhips and goods thereof, which ſhall hap-'pen to be forced aſhore, or ſtranded *upon the coaſts of this* '*kingdom,—or any other of her Majeſty's dominions*; and for 'inflicting the puniſhment of death on ſuch as ſhall willfully 'burn or deſtroy ſhips.' Now, as this ſtatute was enacted poſterior to the Union, the words, 'upon the coaſt of this king-'dom,' undoubtedly comprehend the ſhores of either England or Scotland. But vain as a criminal's plea might be deemed, who would urge that he did not fall under this ſtatute, becauſe the ſhip he had pillaged or deſtroyed was forced aſhore not at the Coquet Iſland, but Eyemouth, the priſoners have not even this to urge in their behalf; for it is excluded by the ſubſequent part of the ſame paragraph in the ſtatute, viz. '*or any other of* '*her Majeſty's dominions*.' Thus, by the *words* of the act, it is evident,

* The priſoners, with Herdman, who was convicted of the ſame crimes on the 29th of June 1784, and others, their aſſociates, in this villanous traffic, are eſtimated to have defrauded the underwriters to the amount of L. 80,000.

evident, that, before the prisoners can establish their argument as to the limitation of this statute, they must show, *that Scotland is no part of the British dominions.*—And by the said act of the fourth of George I. it is declared, that this statute of the 12th of Queen Ann, for preserving of stranded vessels, and preventing the willful destruction of ships, 'hath been found, by experience, to be of great use and benefit to the sea-faring men and merchants *of this kingdom, and other his Majesty's dominions.*' 1784

Further, the whole words of the act, 4th of George I. are dictated in the most general terms.—*If any owner of any ships shall destroy the same, to the prejudice of any person,* he shall suffer death.—Indeed, when it is intended that a British statute should not extend to Scotland, its expressions are not ambiguous or slovenly; for there is a clause declaring, either that it is only to have effect in England, Wales, or Berwick upon Tweed; or, that nothing contained in the act shall extend to Scotland. But no such restrictive clause is to be found in the statute libelled on. —As to the case of Lampro quoted for the prisoners, it was answered, that this was but a single decision of a single judge: A decision so much unlooked for, that even Lampro's counsel had not pleaded that these acts did not extend to Scotland; but only that trial could not proceed upon them, except by commission of oyer and terminer.—And that the Judge Admiral's jurisdiction to try offences against these acts, was established by Charles II. A. D. 1681, chap. 16. which vests in this judge a jurisdiction in all maritime causes, over all persons foreign or domestic.

The prisoners had also objected to the relevancy of the indictment against them, upon the common law, so far as respected the brigantine the Endeavour; for they pleaded, that all which

1784 had been charged againſt them, was an intention to deſtroy the veſſel, which was never carried into execution. But this argument would not avail them; for, 1*mo*, The guilt in them was completed, as far as it lay in them to accompliſh it, by the inſtructions given by them to the maſter and mate to deſtroy the ſhip in the courſe of the voyage, ſo that ſhe might not come to the hands of the perſons to whom ſhe had been conſigned; and conſequently the priſoners embezzlements of her cargo might not be detected; a purpoſe equally accompliſhed, by the Endeavour's being captured by an American privateer. 2*do*, Their purpoſe was accompliſhed, in ſo far as holes were bored in the bottom of the ſhip, by the priſoners aſſociates, the maſter and mate of the veſſel, although they were not mad enough to let in the gulf, at a diſtance from ſhore, to the certainty of their being drowned. 3*tio*, Their guilt was not bare intention, but was actually accompliſhed in ſo far, as the libel charged them with piratically and fraudulently relanding part of the cargo of the Endeavour, before ſhe left the Clyde.

The Judge Admiral pronounced a very long and minute interlocutor, ſuſtaining the juriſdiction of the Court, and finding, that the clauſes libelled on, in the 4th and 11th acts of George I. did extend to Scotland: But, as the Endeavour was taken before the alledged intention of deſtroying her was carried into execution, finding, that this article of the indictment does not fall within either of the ſtatutes; but that the offences charged in the indictment are relevant at common law to infer an arbitrary puniſhment: And finding the priſoner, Macallum's, deſtroying the New York, relevant to infer a capital puniſhment in terms of the acts.—His Majeſty's Solicitor General then declared,

clared, that he reſtricted the whole of the libel to an arbitrary punishment. 1784

THE PROOF.

The counſel for the proſecutor propoſed to produce in evidence the declaration which the priſoner, Macallum, had emitted in a civil action which was inſtituted againſt him by certain underwriters. The counſel for the priſoners objected, that this declaration could not be brought againſt him in a criminal proceſs. The Judge Admiral repelled this objection. The declaration related ſolely to the New York.

John Carmalt, merchant in Greenock, depoſed, That he heard the priſoners acknowledge they were in part owners of the Endeavour. In a few days after the proclamation was iſſued, offering a pardon to any perſon who would diſcover thoſe concerned in caſting away certain veſſels, the deponent met the priſoner, Maciver, who aſked him if he had ſeen the proclamation? and added, he was ſorry he had not left the country five or ſix months before; for he had ſeen a cloud gathering, which would ſoon burſt; and he was afraid that if Robertſon, the maſter of the Endeavour, ſhould come home, he would diſcover things not fit to be known. The priſoner, Macallum, informed the deponent he was in part owner of the New York. After advice came of this veſſel's being loſt, the deponent aſked Macallum if he had ſent his vouchers, in order to recover the inſurance? but was anſwered he had not. In a fortnight he repeated the queſtion, and got the ſame anſwer; upon which the deponent ſaid, 'it did not look ſo well that he had not forwarded his vouchers, 'as the proteſt was come to hand.' Macallum told the deponent,

1784 nent, that a box of books had been carried away from his warehouſe, which increaſed the deponent's ſuſpicions. He aſked if that box was included in the bill of loading and general invoice, and if it was entered in the Cuſtomhouſe? to which Macallum anſwered in the negative, ſaying, that, when Mr Hunter ſhould receive the accounts of what had happened, he would be ſurpriſed to find that no ſuch box was mentioned in the invoice. The deponent deſired Macallum to ſhow him the bill of loading, as it would give him ſatisfaction to ſee whether this box was included in it or not. Macallum gave it to him; and, upon examining it, 'he found the box of books was included in it.' The deponent then ſaid to Macallum, 'What will you do now; you 'will be utterly undone?' to which Macallum replied, he would find out a way to remedy that; upon which he took out of his deſk a blank bill of loading, ſigned by Forlay the maſter of the New York; and he, and David Thomſon merchant in Greenock, in the deponent's preſence, filled up the blank bill of loading; and Thomſon deleted the articles from the copy of the Cuſtomhouſe entries, and general invoice of the goods ſaid to be ſhipped on board the New York. Then Macallum, with his own hand, filled up the articles, and omitted the box of books mentioned above; alſo four boxes of linens, and ſome other things which the deponent does not remember, all of which were included in the original bill of loading and general invoice, and alſo in a letter addreſſed to the merchants at New York, ſpecifying the particulars of the cargo.—When this operation was performed upon the bill of loading, the priſoner, Macallum, wrote a letter to his correſpondents at New York, deſiring them to pay no regard to the firſt letter, which bore that the box of books, &c. were ſhipped for them, as they had not been ſhipped. But the ſecond and laſt letter neither was ſent, nor was ever meant to be ſent, to New York, but was preſerved, in caſe the firſt mentioned letter and invoice

invoice ſhould be produced in evidence againſt Macallum. Depoſed, That he heard Macallum ſay he had produced the falſe bill of loading when examined before the Judge Admiral.—Macallum told the deponent he had ſent the boxes of linens to one Miller at London. 1784

William Horn, late mariner on board the Endeavour, depoſed, That he went as a ſailor in this ſhip from Greenock to Hallifax. About two days after they left Greenock they put into Kinſale; and the veſſel was taken in the courſe of the voyage by the *Swift*, an American privateer. The deponent heard John Mount, one of the crew, ſay, he knew this would be the caſe, for Captain Robertſon had put into Kinſale to ſee whether it was 'a pine 'plug or an oak plug *that was put into the ſhip*.' She lay at Kinſale a fortnight, and no repairs were made on her during this time, *ſave paying her ſides and tarring her wales*. Depoſed, That the veſſel became leaky three days before ſhe was taken. The deponent and Alexander Barber were upon the watch about four in the morning; the weather was fine; Neil Macallum, the mate, came upon deck, threw himſelf upon the hencoop, and ordered the deponent and Barber to *rigg* the pump. They remonſtrated, that it was uncommon to *rigg* the pump at that hour, and the veſſel had been pumped at twelve at night, and was then dry. The mate, notwithſtanding, inſiſted that the pump ſhould be tried; and Barber and the deponent went and pumped for about three quarters of an hour ere they overcame the water. During this, the Captain and the mate took their turn in working at the pump; for the Captain, who was in bed when they fell to work, roſe as ſoon as he heard the pump going: And from this time till the ſhip was taken, one pump was kept conſtantly going, and another occaſionally, to aſſiſt it when it blew hard.—On the morning on which it was diſcovered that

the

1784 the ſhip was making water, before day light, when all was quiet, the deponent went down into the cabin, and 'thought he heard 'like the noiſe of water ruſhing in under the *ſcuttle* * in the 'cabin.' He immediately told the mate, and offered to go down and look at it, but the mate forbade him, ſaying, he would go himſelf. He went down, and ſpeedily returned, and called the deponent a damned raſcal, for there was no water coming in under the *ſcuttle*. The deponent then went over the *quarter* on a rope, to ſee if he could diſcover the leak from the outſide, but could not. Then the deponent and another of the ſailors called Barber, went again into the cabin, and heard the gurgling noiſe which the deponent had done before; and from this they went to the pump, where they ſaw the water running into the pump-well abaft; but they minded the matter no more. The deponent and Barber informed the crew of what they had obſerved, and they were uneaſy at the information. They went round the veſſel on the outſide, trying to diſcover the leak, but could not; then they expreſſed their fears to the Captain, and their wiſh that the veſſel ſhould be examined at the place where the deponent and Barber had heard the noiſe: But the Captain bid them look at the bow; and both he, and Neil Macallum the mate, ſaid, '*that, if the veſſel ſhould ſink, the boat was large enough to 'carry them all to land.*' The ſhip being captured by the Swift, an American privateer, both Robertſon and Neil Macallum told the ſailing-maſter of the Swift, that the leak was abaft in the *runn* of the Endeavour. Her crew were put on board the privateer; and the carpenter's mate of the latter was ſent to examine the leak. Upon his return to the privateer, 'he told the 'Endeavour's people that they were all a parcel of damned raſ-'cals, for they had been boring holes in the veſſel.' And, upon the

* Scupper, I ſuppoſe.

on the crew's aſking what kind of holes they were, he anſwered, that they had been made by an inch and half oggar, or a ſmall bung borer. Depoſed, That one day when he was 'making fun' with the ſecond mate, he run off with his knife, and was going to hide it in the pump-well, when he obſerved a line faſtened to one of the ſtanchels of the pump-well, and was going to take hold of it, but inſtantly Neil Macallum called to him to let it alone, aſking him, what had he to do there? After the Endeavour was carried into Penobſcot, he heard ſeveral of the crew, and in particular John Riddell, ſay, that *they had ſeen a plug in the pump-well:* And one day when he was drinking in Halifax with John Mount, he told the deponent, 'it was lucky he did 'not pull the line he ſaw at the ſtanchell in the pump-well, for 'that John Riddell told him it was faſtened to the plug.' Depoſed, That, before they left Greenock, the priſoner Maciver, and Neil Macallum, came aboard the Endeavour one day about twelve o'clock, and brought a box with them, when there was nobody in the ſhip except the deponent and Murdoch Macleod. The priſoner deſired them to go aſhore, and get their dinner, and to return at three o'clock. They did ſo; and when they came back, the priſoner and Neil Macallum were gone. Thinking that they might have brought ſomething on board to drink, the deponent and Macleod went into the cabin, and opened the box which the priſoner and Neil Macallum had brought on board, and found it empty: But, upon looking into the locker of the cabin, *they ſaw in it a large bung-borer, a ſmall one, a gouge, and a chiſſel, and obſerved that part of the cargo abaſt the pump had been moved to a greater diſtance from it, and other parts of the cargo brought nearer it.*—After the Endeavour was taken by the privateer, the deponent being ſent for ſome things from the latter ſhip to the former, ſaw the carpenters ſtopping up the holes in the *runn* of the veſſel, 'which brought to the deponent's mind 1784

1784 'ſome ſuſpicions as to the uſe that had been intended by the 'bung-borer, &c. he ſaw in the locker of the cabin at Greenock.' When he returned on board the privateer, he underſtood that ſome converſation had paſſed between Captain Robertſon and his crew reſpecting theſe holes, and that he had given a draught to John Mount for L. 20, and to Alexander Barber for L. 10, upon John Maciver and Company. On this the deponent went to Robertſon, ſaid he would expoſe him as ſoon as he got home, '*and aſked him why he had not given the deponent money as well* '*as the others?*' Robertſon anſwered, 'he ſhould certainly ſee 'him put to rights when he arrived at Greenock;' and added, if the deponent '*was to expoſe him, he Robertſon might hang for* '*it.*'—After the deponent's return to Greenock, he went to Robertſon, and aſked him to fullfil his promiſe; upon which Robertſon went with him to the priſoner Archibald Macallum, who gave the deponent L. 6. He inſiſted upon getting as much as the reſt; but was at firſt offered only L. 5, and when the offer was raiſed to L. 6 he accepted of it.—Depoſed, That when the Endeavour lay in the Fairly, off the coaſt of Ayrſhire, a large new boat came to her from Greenock, and maſts and ſails were made for it on the Banks of Newfoundland.

James Mackinnon, late mariner on board the Endeavour, depoſed, That ſhe ſprung a leak four days before ſhe was captured by an American privateer. The deponent and the reſt of the crew made ſearch for it in the fore part of the veſſel, but the Captain would not allow them to look for it abaft, ſaying, he had looked there himſelf. They ſet two pumps agoing; one of them they wrought conſtantly, the other occaſionally. When the ſhip was taken, the crew were carried on board the privateer which captured them, and the Captain of the privateer ſent his own carpenter into the Endeavour to ſearch for the leak. After he

he had discovered it, and returned to the privateer, he said to Captain Robertson 'that he had intended to sink the vessel the 'Endeavour, as two holes of an inch and half womble-bore had 'been found in the after-peak of the Endeavour, which he had 'plugged up.' But Robertson said, 'that he had never bored 'any holes in the vessel.' Deposed, That the deponent was sent again on board the Endeavour; and after the holes were thus plugged up, she was as tight as ever. They were not within sight of land when the ship began to leak, but the weather was fine, the pumps kept the water at under, and the crew entertained no apprehensions. Deposed, That the prisoners were owners of the Endeavour. 1784

James Horn, father to William Horn a preceding witness, deposed, he 'understood that the money given to his son was for 'wages, or for time lost by him when he was away.'

I am not able to discover the relation which the evidence given by the following witnesses bears to the trial of the prisoners for their fraudulent and criminal practices respecting the Endeavour, of which alone they were convicted by the jury, or the tendency it could have towards their conviction of that crime.

William Macintosh deposed, That he saw James Robertson, Captain of the Endeavour, have an acceptance of James Herdman's for L. 94 : 10 : 0.—Malcolm Jamieson deposed, That he was desired by Charles Munn to get L. 200 insured for James Robertson upon the ship the Albion, which he got done accordingly; and he got from Robertson an indorsation to Herdman's bill for about L. 94.—Charles Munn deposed, That he was desired by James Robertson to go to Herdman, and get money from him to pay the premium upon the insurance of goods

1784 which he was to export in the Albion, and Herdman gave Robertſon his bill for L. 94.—Archibald Campbell depoſed, That Archibald Paterſon, ſupercargo of the New York, in July laſt, ſent him a promiſſory note for L. 100, ſigned by Archibald Macallum, and a receipt for L. 250, ſigned by Archibald Macallum and James Herdman.—Depoſed, That inſurances were made upon the New York and her cargo, at London and other places; '*but that none of the ſums inſured on the New York* '*were recovered from the underwriters, that he knows of.*'—John Campbell, Eſq; Juſtice of Peace for the county of Renfrew, emitted a depoſition relative to a box of books found in the poſſeſſion of the priſoner, Macallum; which box was brought before him as Juſtice of Peace, in an action at the inſtance of certain underwriters in London, againſt the owners of the New York.—Depoſed, That *ſailors wages are not due, if the ſhip be loſt or taken, unleſs as much of the wreck be ſaved as is ſufficient to pay them.*—William Paton bookſeller depoſed, That he ſold the above box of books to Archibald Macallum and Co.—Jean Forlay, ſiſter to William Forlay, maſter of the New York, depoſed, That, from ſome words which dropped from her brother when he was the worſe of drink, ſhe ſuſpected the New York was 'not going out upon a proper footing,' and ſhe adviſed him to have no concern with the voyage.—Alexander Stevens, a paſſenger on board the New York, emitted a depoſition relative to that veſſel, and to goods which had been relanded from her; but, upon a motion by the priſoner's counſel, the judge ordered that this depoſition, as to the relanding of goods from the New York, ſhould be deemed no part of the evidence, ſeeing that this branch of the indictment was not found relevant; becauſe no part of the money inſured upon this veſſel was received from the underwriters. Stevens alſo depoſed as to the manner in which the New York was loſt or caſt away.—Angus Maclean, late

late mariner on board the New York, depoſed, That this ſhip ſtruck on a ſand bank, on a fine clear evening, about eight o'clock; and that he heard William Moore the mate ſay, 'He 'knew well enough that the veſſel was to be loſt.' 1784

The jury unanimouſly found the priſoners, Maciver and Macallum '*guilty as far as regards the brigantine the Endeavour*; 'and they all, in one voice, find the charge not proved againſt 'the pannel, Archibald Macallum, as far as regards the brigantine New York.'

The Solicitor General craved judgment upon this verdict. The counſel for the priſoners objected, that no judgment could paſs upon it, as one of the jurymen had gone out of Court, and may have had converſations with various perſons during his abſence; and, therefore, the priſoners ought to be immediately acquitted, and diſmiſſed from the bar.—It was replied for the proſecutor, that, during the neceſſary abſence of this juryman, on account of his health, the taking of the evidence was ſtopped, and that he had no converſation with any perſon when out of Court. This being verified by the macers * who attended him, the Court repelled the objection.

Judgment was then paſſed upon the priſoners, declaring them infamous perſons; ordaining them to ſtand an hour on the pillory, in the city of Glaſgow, on the eighth day of July, with a label on their breaſt, denoting, that they had procured holes to be bored in the Endeavour to defraud the underwriters; and then to be baniſhed Scotland for life.

Againſt

* Mace-bearers.

1784 Againſt this ſentence the priſoners preſented a bill of ſuſpenſion to the Court of Juſticiary. The reaſons of ſuſpenſion were thoſe which have been already ſtated againſt the relevancy of the indictment, and which were over-ruled by the Judge Admiral. Other objections were alſo urged againſt this judgment, viz. the allowing of Macallum's declaration, emitted in an action merely civil, to be received as part of the evidence, which ought by no means to have been laid before the jury, *the generality of whoſe verdict, in finding the priſoners 'guilty, as far as regards 'the brigantine the Endeavour,' was highly improper*—The circumſtance of one of the jurymen being out of Court while the trial was going on, which the priſoners contended did nullify the whole proceedings—The Judge Admiral's having pronounced a ſentence ordaining them to be pilloried at Glaſgow; for he had no juriſdiction but within flood-mark—And, *laſtly*, That, even ſuppoſing the priſoners guilty, the ſentence was by much too ſevere; for, conſidering the temper of the times, it would probably be productive of their violent and inhuman deaths.

To theſe the following anſwers were made by the proſecutor: To the objections againſt the relevancy of the indictment, the arguments in ſupport of it, which had been already ſtated to the Judge Admiral, were ſubmitted to the Court of Juſticiary.—As to the iniquity of admitting Macallum's declaration as a part of the evidence, it was anſwered, that extrajudicial and private converſations might legally be brought in evidence againſt a priſoner; therefore, much more might Macallum's guarded declaration which he had emitted before a reſpectable judge be received in proof againſt him. But, even ſuppoſing this to be improper, the priſoners can have ſuſtained no injury by it; for Macallum's declaration related ſolely to the New York, and the jury had acquitted him of the charge reſpecting that veſſel.—As to one of the

the jurymen's having retired for a while out of Court, the ſame 1784 anſwer was made which had been urged before the Court of Admiralty.—It was obſerved, that the plea of the Judge Admiral's having no juriſdiction to pronounce any ſentence but what was to be executed within flood-mark, was, indeed, a curious one. The ſtatute of Charles II. A. D. 1681. chap. 16. beſtowed on the Court of Admiralty an ample juriſdiction; and the practice of the Court, as exemplified in the caſe of Lampro, juſtified this mode of pronouncing ſentence.—As well might the ſuſpenders have alledged, that the Judge Admiral could hold no Court but within flood-mark, and iſſue no warrant for apprehending a priſoner, unleſs he ſhould be found within flood-mark.—*Laſtly*, That the ſentence was by no means too ſevere for thoſe who could form ſuch a profound ſcheme of pernicious villany; and, as to the priſoners falling a ſacrifice to the rage of a mob, the magiſtrates of Glaſgow would, no doubt, 'take care that no improper ex-'ceſs ſhould be committed.'

The Court of Juſticiary pronounced the following judgment: 'Find, That the ſtatutes of the 4th and 11th of George I. libelled 'on, do not extend to Scotland; but find, that the libel, as laid 'upon the common law, was rightly found, by the interlocutor of 'the Judge Admiral, relevant to infer an arbitrary puniſhment*; 'and find, that the verdict of the jury, as applied to that inter-'locutor, does warrant the judgment of the Judge Admiral 'which paſſed upon it: And, upon conſidering the atrocity and 'dangerous nature of the crime ſo charged and proved againſt 'the complainers, find there is no juſt ground for mitigating 'that judgment; and repel the whole reaſons of ſuſpenſion, and 'refuſe the bill.'

* Records of Juſticiary, July 14. 1784.

1784 I am happy to obſerve, that this diſtinction which their Lordſhips thought themſelves obliged by law to make between the commiſſion of ſo atrocious and dangerous a crime in England, and in Scotland, is about to be done away: For, by a bill for regulating the juriſdiction of the Court of Admiralty in Scotland, which I am informed juſt paſſed the Houſe of Commons, and which will probably receive the ſanction of the other branches of the legiſlature; the ſtatutes libelled on, relative to the deſtroying ſhips, are declared to extend over both parts of the United Kingdom.

When I formed, and had in part executed, the plan of this work, I was not aware that I ſhould have ſo frequent occaſion to exerciſe the preſumptuous and irkſome duty of delivering my own remarks; but conſiſtency with the general purport of this work, and perhaps propriety alſo, require me to make an obſervation upon this verdict of the jury, in which I ſuppoſe the reader has preoccupied me. The indictment charged the priſoners not only with procuring holes to be bored in the Endeavour, in order that ſhe might be deſtroyed, but alſo with fraudulently relanding part of her cargo before ſhe left the Clyde. The jury found the priſoners guilty, *in as far as regards the Endeavour.*—*Now, in the whole of this trial, there is not a word of evidence relative to the relanding of goods from that ſhip.*—I mention this with the leſs reluctance, as, from the reſpectable character of the perſons who compoſed this jury, it is impoſſible that any blame can lie upon them, except merely that of inaccuracy.--In this country, which is a land both of liberty and of law, juries cannot too cautiouſly attend to the nature of their important, their *ſacred*

truſt:

trust: For they are equally distant from the discharge of their duty when they acquit a criminal in contempt of law and of evidence, and when they indiscriminately find a prisoner guilty of the charge in the indictment, although the proof applies but to part of the charge. 1784

OF FORGERY.

Mr George Henderſon merchant in Edinburgh, and Margaret Niſbet, wife of Alexander Macleod wigmaker in Leith, for forging a bill upon the Ducheſs of Gordon.

1726 THE time which according to the forms of our law, and the occult nature of this crime, is conſumed in proving of a forgery, has occaſioned trials for this offence generally to be taken before the Court of Seſſion; becauſe, in the Court of Juſticiary, after the jury is appointed, and the evidence begun to be led, the whole muſt be completed, and a verdict pronounced, ere the jury are ſuffered to diſmiſs.

As the criminal juriſdiction of the Court of Seſſion does not amount to the power of awarding ſentence of death, the following mode of procedure is obſerved. When the forgery appears to the Court to be of ſo deep a nature as to deſerve a capital puniſhment, they declare the deed in queſtion to be reduced, as being falſe and forged; and remit the priſoner to the Court of Juſticiary: This ſentence is called a '*Decreet of Reduction and Improbation, and Act and Remit.*' The priſoner is then ſerved with an indictment, ſetting forth, that he had committed forgery; that he had been found guilty of the ſame by ſentence of the Court of Seſſion; and that, upon this being found proved by a jury, the priſoner ſhould be condemned to ſuffer death, and confiſcation of perſonal eſtate. The decree of the Court of Seſſion, declaring the forgery, is then read over before the jury; it

it is held complete legal evidence, or what is called *probatio probata*, against the prisoner, who is thereupon convicted and condemned. 1726.

In the beginning of May 1726, it was discovered * that one Petrie, a town-officer in Leith, held the Duchess of Gordon's bill for L. 58, which had been delivered to him, blank indorsed, by Mrs Macleod, as a security for L. 6, for which sum her husband had been laid in prison. The bill was drawn by George Henderson, accepted by her Grace, indorsed by Henderson the drawer, to Mrs Macleod, and blank indorsed by Mrs Macleod; and in virtue of this blank indorsation Petrie the town-officer held it. The holder of the bill was apprehended and brought before the magistrates of Edinburgh: In a few days after, Mrs Macleod and Mr Henderson were also brought before them. It was manifest that the Duchess of Gordon's acceptance was a forgery; but the point in dispute was, whether this forgery was contrived by Mr Henderson the drawer and indorser, or Mrs Macleod the indorsee.

Upon the 5th of May Petrie was brought before the magistrates, and told the manner in which he came by the bill. Henderson was at the same time brought before them, who denied all knowledge concerning it. Mrs Macleod was apprehended on the 7th, and examined; and she and Henderson being confronted with each other, the former did judicially declare, that the bill, and other deeds challenged, were written by Henderson; who judicially denied all knowledge concerning them. Upon which, both Mr Henderson and Mrs Macleod were committed close prisoners.

* Extracted Decree of the Lords of Session, in the archives of the Court of Justiciary. Records of Justiciary, January 23. and February 4. 1727.

1726 A complaint againſt Mr Henderſon was preſented to the Court of Seſſion by Duncan Forbeſs of Culloden, Eſq; his Majeſty's Advocate, ſetting forth, that the priſoner, Henderſon, had counterfeited the Ducheſs of Gordon's acceptance to a bill drawn by himſelf for L. 58: That, upon being informed, on the 3d of May, of the bill's being intimated to her Grace, he ſtruck himſelf upon the breaſt, and exclaimed, 'All would be ruined!' And that, upon his being told of the Ducheſs of Gordon's declaring ſhe had no concern with the bill, he granted a freſh obligation for the ſum, and ſubſcribed the ſame before witneſſes. And, therefore, craving their Lordſhips to take trial of theſe facts; and, upon their being proved, to inflict upon Mr Henderſon an adequate puniſhment.

A complaint alſo againſt Mrs Macleod was preſented to the Court, at the inſtance of Mr Henderſon, ſetting forth, that ſhe had counterfeited the above acceptance of the Ducheſs of Gordon, had depoſited in the hands of William Petrie the bill ſo accepted in ſecurity for L. 6; and that, when the bill came to be challenged as forged, ſhe counterfeited an obligation, bearing to be ſubſcribed by Henderſon before two witneſſes, for L. 58, being the amount of the ſaid bill.—It was not without great reluctance that his Majeſty's Solicitor General, in abſence of the Lord Advocate, did grant his concurrence to this complaint.—Mr Henderſon alſo raiſed a ſummons *of Reduction and Improbation* of the deeds produced, ſaid to be written by him.

Mr Henderſon, in his complaint againſt Mrs Macleod, alledged, that the bill was not fabricated by him; for, 1*mo*, The name of the drawer adhibited to it was not of his hand-writing, nor did it bear any reſemblance to it. 2*do*, He had no acquaintance nor dealings with the Ducheſs of Gordon, ſo as to give a plauſible colour

colour to a forgery upon her Grace. *3tio*, He had no acquaintance nor dealings with Mrs Macleod, to whom the bill is indorsed, nor did he ever see her save once, about three years ago; although Mrs Macleod, with an effrontery acquired by '*proper* '*habits*,' has been pleased judicially to declare, in presence of their Lordships and of himself, that it was he who indorsed to her this bill. *4to*, That he did not grant her an obligation to pay the sum of L. 58, when it came to be discovered that the bill was a forgery. And, *ultimo*, That, on the 3d of May last, when he is said to have subscribed that obligation in a house in the Canongate, in presence of witnesses, he was not without the *Ports* of Edinburgh during the whole day; and at the hour of the evening at which it is alledged the obligation was subscribed, he was engaged with company in his own house. 1726

On the other hand, the Lord Advocate, in his complaint against Mr Henderson, and Mrs Macleod, in her answers to the complaint at Mr Henderson's instance against her, set forth, *1mo*, That the bill produced in process was a forgery, which, indeed, was acknowledged on all hands; and so clumsily was it executed, in so far as respected the acceptor, that it had but the half of her name, the first part being entirely wanting: For it was signed *Gordon*, without the Christian name *Eliz^a*, which was neither the usual manner of her Grace's subscription, nor that of any Peeress, except of those which are such in their own right, and not in right of their husband. *2do*, Mr Henderson did *use this forged bill*, by delivering the same to Mrs Macleod, drawn, accepted, and indorsed, as it now stands. *3tio*, That, when Mr Henderson was told of the bill being intimated to her Grace, he struck himself on the breast, and said, 'All would be ruined!' *4to*, He denied his having been in company with Mrs Macleod for some years; whereas it would be proved, that, on the night of

1726 of his granting her the obligation for L. 58, they were in company together in the houſe of John Gibſon wright in the Canongate, in preſence of ſeveral witneſſes. *5to*, That, when the bill was diſcovered to be a forgery, he wrote a letter, now produced, to William Petrie holder of the bill, requeſting him to delay ſeeking payment till Saturday, when he the priſoner, Henderſon, ſhould take up the ſame. *6to*, That he granted his obligation to Mrs Macleod, the indorſee, for the amount of the ſaid bill. *7mo*, That the cauſe of the bill's being indorſed to Mrs Macleod was as follows: She and her huſband had taken a large houſe in Leith as a tavern, furniſhed it ſuitably, laid in a ſtock of liquors, and given the charge of them to Helen Nimmo as houſekeeper. Mrs Macleod having occaſion laſt harveſt to be a conſiderable time abſent from her own houſe, upon her return, and ſettling accompts with Helen Nimmo the houſekeeper, ſhe found that Nimmo, by deficiency in the caſh which ſhe ſhould have delivered to the priſoner Mrs Macleod, and by embezzlement of her liquors and linens, had incurred a debt to her of L. 58. She threatened to take out a warrant againſt her, but deſiſted, upon *Nimmo's declaring that ſhe would get Mr George Henderſon to ſatisfy and pay Mrs Macleod.* Accordingly, Mr Henderſon came to Mrs Macleod's houſe, and offered her his bill for the amount; but ſhe declared that he muſt find ſomebody who would be conjunct with him in the bill. Soon after, Mrs Macleod diſcovered that Nimmo the houſekeeper was with child, and ſhe threatened *to inform the kirk ſeſſion* *, upon which Mr Henderſon came to Mrs Macleod the very next day, and indorſed to her the bill now lying in proceſs; then took away Nimmo

* As Ghoſts were formerly the bugbear which was made uſe of to frighten children, ſo the kirk ſeſſion was the bugbear to frighten grown perſons. The one was to be terrified on account of the *fleſh*, the other on account of the *ſpirit*.

mo out of Mrs Macleod's ſervice, and ſent her to England (as was ſuppoſed) to be delivered of her child. 1726

Both Mr Henderſon and Mrs Macleod emitted judicial declarations before the Lords of Seſſion; and, upon the 30th of June, a ſigned information being given in to the Court by Mr Henderſon, that one David Houſehold, *alias* Cameron, was the actual forger of the deeds produced, their Lordſhips granted warrant for apprehending him wherever he could be found. The Lords ordained both complaints to be conjoined; and the examination of witneſſes began upon the eighth of July.

THE PROOF.

John Gibſon wright in the Canongate of Edinburgh depoſed, That he knew Mr Henderſon preſently at the bar, having ſeen him ſeveral times, and been once in company with him. Depoſed, That, on the 3d of May laſt, about nine at night, as he was going down the Canongate, he met Mr Henderſon and Mrs Macleod, who went along with him to the deponent's houſe; he there ſaw Mr Henderſon ſign the obligation to Mrs Macleod now exhibited; the deponent read it over, and ſigned as witneſs to Mr Henderſon's ſubſcription; and the deponent's two daughters and Archibald Dempſter were preſent. Part of this deed was written before the deponent ſaw it; but the laſt part of it, viz. from the following words, 'before theſe witneſſes,' downwards, was written with Mr Henderſon's own hand in the deponent's preſence. They ſtaid in his houſe almoſt an hour; and, during this time, Mr Henderſon repeatedly deſired of Mrs Macleod '*that ſhe ſhould delay and keep herſelf quiet till Saturday,* '*and ſhe ſhould have her money*; which ſhe refuſed to do unleſs 'he ſigned the obligation.' Mr Henderſon, Mrs Macleod, and the

1726 the deponent, then went down the Canongate together. When they were before Deacon Lauchlan's houſe, 'Mrs Macleod told 'Mr Henderſon ſhe had intimated the bill to the Ducheſs's 'gentleman; whereupon he Henderſon clapped upon his breaſt, 'and ſaid, O, good God, that is all wrong; why have you done 'ſo?' and upon this he immediately left them. Depoſed, That Mr Henderſon had on dark coloured clothes and a black wig, ſuch as he now wore. And being interrogated, If he knew one David Houſehold, *alias* Cameron? depoſed, He knew no ſuch perſon.

Archibald Dempſter, ſervant to James Aitkin wright, depoſed, That, on the 3d of May laſt, after nine at night, he was ſent for by John Gibſon, the preceding witneſs, to his houſe. He found there Mr Henderſon, Mrs Macleod, Gibſon, his wife, and two daughters. Henderſon was then writing a paper which the deponent ſaw him ſubſcribe; Gibſon ſigned as witneſs to the deed, and deſired the deponent to do the ſame. He heſitated, leſt it might be the cauſe of his afterwards being taken from his work, or of otherwiſe being brought to trouble. But 'Mr Gibſon ſaid, it was no more but *an obligation which Mr Henderſon was giving Mrs Macleod for ſome money, and that he would pay againſt Saturday*, and the deponent would get no trouble 'about it;' upon which he ſigned as witneſs, and then went immediately to his maſter's houſe. Being interrogated, depoſed, That he never ſaw Mr Henderſon before that night, nor ſince, except once about three weeks after, when he, Mr Henderſon, was brought before the magiſtrates of Edinburgh. And depoſed, That he thought Mr Henderſon, preſently at their Lordſhips bar, was the ſame perſon whom he ſaw in Mr Gibſon's, and afterwards before the magiſtrates. Depoſed, That Mrs Macleod did

not

not ſpeak to him, farther than aſking his name, and bidding him take a drink. 1726

Chriſtian Gibſon, daughter of John Gibſon wright, depoſed, That, on Tueſday the 3d of May laſt, between nine and ten at night, ſhe ſaw 'Mr George Henderſon, the ſame perſon that is 'at preſent in the bar, in her father's houſe, and did ſee him fi-'niſh a paper, by adding two lines thereto, and ſaw him ſub-'ſcribe the ſame;' and her father and Archibald Dempſter ſigned as witneſſes. There were alſo preſent in the room when the deed was ſigned, Mrs Macleod and the deponent's ſiſter; but her mother was not preſent, having gone out to ſee a ſick child. Depoſed, She heard Mr Henderſon ſay, 'that the money ſhould be 'paid againſt Saturday,' and ſaw him deliver the deed to Mrs Macleod, who put it in her breaſt. The deponent never ſaw Mr Henderſon but at that time, and when he was brought before the magiſtrates.

Catherine Gray, ſervant to Alexander Hope taylor in Canongate, depoſed, 'That ſhe had frequent occaſions of ſeeing and 'knowing George Henderſon at the bar; and, particularly, on 'the third day of May laſt, on which the Deacons of the Cor-'porations of the Canongate were choſen, ſhe did ſee the ſaid 'George Henderſon priſoner, about nine o'clock at night, coming 'up the Canongate in company with Mrs Macleod the other 'priſoner; and, a little above the Canongate Croſs, ſhe did ſee 'them meet with John Gibſon; and the deponent having aſked 'Mrs Macleod, If ſhe had got payment of her money due to her 'by Mr Henderſon? the ſaid Mrs Macleod anſwered, that ſhe 'was juſt going to get ſecurity for it. Being interrogated for Mr Henderſon, depoſed, 'That ſhe did not know, and, to her

1726 'knowledge, did never ſee, the perſon named David Houſe-
'hold.'

Catherine Falconer *indweller* * in Edinburgh depoſed, 'That, 'upon the third day of May laſt, being the day on which the '*Trades* of Canongate elected their Deacons, ſhe, on the even-'ing of that day, after nine at night, did ſee Mrs Macleod 'priſoner walking up the Canongate, and, before her, ſhe ſaw 'walking George Henderſon priſoner at the bar, and John Gib-'ſon. Deponed, That, upon her meeting Mrs Macleod, as ſaid 'is, ſhe the deponent aſked her where ſhe was going? to which 'Mrs Macleod anſwered, that ſhe was going to John Gibſon's 'houſe to receive ſecurity for a debt due to her by George Hen-'derſon.'

Janet Lyle *indweller* in Edinburgh depoſed, That ſhe knew one Helen Nimmo who was ſervant to Mrs Macleod; 'and ſhe 'did hear Mrs Macleod, particularly about the end of laſt year, 'ſay to Helen Nimmo ſhe was much in arrear to her; to which 'Helen replied, that *the miſtreſs might be eaſy, for ſhe knew of a* '*paymaſter, to wit Mr Henderſon.* Deponed, That, towards the 'end of the laſt year, the deponent having frequent occaſion to 'be in Mrs Macleod's houſe, ſhe did ſometimes ſee in the cellar 'with the ſaid Helen Nimmo, a gentleman like to Mr Hender-'ſon at the bar; but cannot be poſitive it was he, having no 'particular acquaintance of him.'

William Petrie, town-officer in Leith, depoſed, That, on the 5th of February laſt, Mrs Macleod delivered a bill to him for L. 58, which was drawn by Mr Henderſon, and accepted by the Ducheſs of Gordon, indorſed by Mr Henderſon to Mrs Macleod, and blank indorſed by her. She gave this bill to the deponent *in*

* Inhabitant of, houſeholder in.

in ſecurity for L. 6 : 1 : 0, which he advanced to her in order to 1726
'*relieve her huſband, Mr Macleod, out of priſon.* Depoſed, he knew nothing as to the verity of the ſubſcriptions, farther than that Mrs Macleod ſaid it was a true bill. 'To the beſt of his 'remembrance, ſhe ſaid the cauſe of her getting that bill was 'tea and other goods ſhe had furniſhed Mr Henderſon.' Depoſed, That, about three years ago, Mrs Macleod delivered to him (in ſecurity of a debt ſhe owed him) a bill for L. 38, or L. 40, drawn in the ſame manner by George Henderſon, and accepted by the Ducheſs of Gordon, and that Mrs Macleod paid him punctually the ſum ſhe had borrowed upon the pledge of this bill, and got up the ſame; and ſhe made uſe of this as an argument for the deponent's advancing her the L. 6 upon the bill produced in proceſs. The deponent did not demand payment of the bill from the Ducheſs of Gordon, for he was prevented from doing ſo during the whole month of April, by Mrs Macleod's telling him, that the Ducheſs was then occupied with her devotions, and that her gentleman, Mr Gordon, was in the North, upon whoſe return the bill would be paid. She added, that ſhe had been to wait upon her Grace, had been kindly entreated, and had got a glaſs of ſome liquor out of the Ducheſs's hand. At laſt, the deponent became ſuſpicious about the verity of the bill; and he told Mrs Macleod, that, unleſs ſhe got a letter from Mr Henderſon, declaring the verity of the bill, he would proteſt it; upon which ſhe brought him the miſſive-letter from Mr Henderſon now produced in proceſs; but the deponent deſired her to get an obligation from Mr Henderſon for the amount, ſigned before witneſſes: She accordingly called on him, and ſhowed him the obligation now produced in proceſs. This he thought happened a day or two before the deponent was apprehended by order of the magiſtrates; which to the beſt of his recollection, was upon the fourth day of May laſt. It was about

1726 ten o'clock at night when ſhe called and ſhowed him the obligation.

Alexander Nicolſon taylor in Edinburgh, being ſpecially interrogated, Whether Mrs Macleod at any time promiſed him any thing to be a witneſs in this cauſe, depoſed, That, about eight days after he was examined before the magiſtrates, the deponent having occaſion to be in the tolbooth of Edinburgh, Mrs Macleod whiſpered to him, that it ſhould be better than L. 4 Sterling to him, if he would depoſe that he had carried a meſſage from Mrs Macleod to Mr Henderſon to come to her; that he came accordingly, and the deponent ſaw him deliver to Mrs Macleod *an accepted bill by the Ducheſs of Gordon:* But the deponent anſwered, ' his conſcience would not allow him to declare ' any ſuch thing.' Depoſed, That he afterwards ' got a letter ' from Mrs Macleod, threatening him, that, in caſe he ſhould ' declare any thing contrary to what he ſaid before the magi- ' ſtrates, the King's Advocate would put him in priſon; and that ' he did ſhow ſaid letter to ſeverals, and *particularly to Mr Hen- ' derſon's doer (agent), Mr Donaldſon, and that the deponent had ' ſince loſt ſaid letter out of his pocket.*' Depoſed, That, in February laſt, when he was working in Mrs Macleod's houſe, he heard her railing upon a maid ſervant ' for want of ſome money, and that ' a man came into the room whom the deponent did not know, ' nor remember any thing of; and that, when the ſaid man was ' gone, Mrs Macleod came to him, and ſaid ſhe had got a bill ' from ſaid man, but named no perſon; and ſaid, it would be ' good money to her. And Mr Henderſon at the bar being ' pointed (out) to the deponent, and aſked if it was the man ' that was in Mrs Macleod's houſe the time deponed upon? deponed, He had not ſeen ſaid man (now) pointed (out) to him, ' in Mrs Macleod's houſe, either that or any other time.' Depoſed,

posed, He thought the man who came into Mrs Macleod's had on a dark coloured wig. 1726

Captain Neil Macleod deposed, That he had a servant, one David Household, a lad about seventeen years of age, who left his service at Martinmas last, and whom he has frequently seen write. The missive letter from Henderson to Petrie, and the obligation by Henderson to Mrs Macleod being shewn to him, deposed, 'That he could not say any thing to the missive letter; 'but, as to the other obligation, deponed, That, to the best of 'his knowledge, it was the hand-writing of the said David 'Household.' Deposed, That Household was not of a slender make; that he wore his own black hair, and was about the head lower than Mr Henderson; but he has seen him since wearing *a light coloured wig*.

Robert Davidson, tutor to the Laird of Renton's children, deposed, That, upon the third of May last, to the best of the deponent's knowledge, he went to Mr George Henderson's house a little after seven at night, and staid there till about eleven o'clock, and, during all that time, Mr Henderson, the deponent, Mr Home, and Mr Kerr were in company together, except that Mr Henderson went occasionally out of the room; and the deponent thinks he was not absent above a quarter of an hour at a time.

William Kerr teacher of French, deposed, That, on the 3d of May last, he was in Mr Henderson's house from eight till ten at night, in company with Mr Davidson, Mr Home, and Mr Henderson. The latter went once out of the room; but the deponent is uncertain whether he went out a second time, and he was not absent above a quarter of an hour at a time.—They

drank

1726 drank three bottles of liquor; Henderſon brought in two of them, perhaps all the three.

Alexander Home writer in Edinburgh, depoſed, That, on the 3d of May laſt, he was in Mr Henderſon's houſe, in company with Mr Davidſon and Mr Ker. The deponent ſtaid there from about eight, till about eleven at night. Mr Henderſon was coming and going to and from the room during this whole time; and the deponent did not think that Mr Henderſon was abſent above a quarter of an hour at any one time.—This witneſs, and the two preceding ones, aſſigned as their cauſe for remembering, that it was on the 3d of May laſt they were in Mr Henderſon's houſe, that he, Ker, and Davidſon, had a previous appointment to meet there, in order to his going to learn French with Mr Ker.

Patrick Innes writer in Edinburgh, depoſed, That Mrs M'Leod having ſhown the deponent the obligation ſubſcribed by Mr Henderſon, and produced in proceſs, told him, that the motive of Mr Henderſon indorſing the Ducheſs of Gordon's bill to her was, that he might conceal an unlawful correſpondence which he kept with one Helen Moody, a ſervant of hers, and carry the ſaid Helen out of the country. Mrs M'Leod told the deponent this in the houſe of John Gibſon, on the 4th or 5th of May. Being interrogated, If he knew that Mrs M'Leod did keep out of the way on account of this bill? depoſed, That Mrs M'Leod abſconded for three days, and told the deponent, that the reaſon of her doing ſo was, 'That Petrie had a warrant to apprehend 'her, *and that ſhe expected payment againſt eight o'clock at night,* '*on Saturday, from Mr Henderſon; and that then ſhe would give* '*them all the tail of a long tow* *.'—The deponent went along with

* The ſwing of a rope.

with Mrs M'Leod to one Doctor Smith, who was well acquainted with the Duchess of Gordon, and requested him to intercede with her Grace, that she would pass from any ground she had for challenging the bill; but this 'the Doctor positively refused; *upon which Mrs M'Leod said she was undone.*' 1726

Mary M'Aulay, widow of Alexander M'Lellan barber in Leith deposed, That some few days after Mrs M'Leod was made prisoner, the deponent saw in her house one David Household, who told her, that, a few days before Mrs M'Leod was apprehended, he, at her desire, did put on a coat of her husband's, and went along with her to the Canongate; and in some house there, did assume the name of Henderson, and under that name, did subscribe a paper, in presence of two witnesses, one of them a married man, and the other a young lad: And he said it was on account of this paper that Mrs M'Leod was put in prison. He added, that the reason she gave for his putting on her husband's coat was, that he might appear like Henderson.—Household expressed his sorrow for what he had done; said he was not aware of his hazard; but now he was in danger of his life, and was resolved to fly the country: That he was afraid to cross at Leith, lest he should be apprehended, and would cross at Queensferry.—And the deponent believed that he fled accordingly.

Thus far had the trial proceeded, neither party being able to produce more witnesses to support their mutual recrimination and defence, when the Lord Advocate, on the last day but one of

1726 of the *Summer Session* *, represented to the Court, that, as the evidence given must have established with their Lordships a conviction of Mr Henderson's guilt, the duty of his office required it of him, to ask their Lordships to pronounce a decree, finding the bill drawn upon the Duchess of Gordon, to be forged by the prisoner Henderson; and therefore remitting him to the Court of Justiciary, that he might suffer a capital punishment.

The counsel for Mr Henderson urged † in his defence, that notwithstanding the direct testimony which was given by several witnesses, of his having granted the obligation relative to the forged bill; yet, having visited him in prison, and repeatedly examined him in private, in the most solemn manner, the simplicity, uniformity, and steadiness of his answers to the counsel's interrogatories, gave the latter, if not a perfect conviction, at least a strong belief, that Henderson was truly innocent.—The counsel therefore requested of their Lordships, that they would not be hasty to embrace, nor resolute to conclude, a decided opinion of Henderson's guilt; for that even procrastination was not a fault, when the life of a man was at stake. And he entreated their Lordships to spare his feelings of the pain it would give them, to see a sentence pronounced on almost the last day of a *Session*, which was to be the foundation of a capital punishment being adjudged to a man, of whose innocence he still entertained

* The terms of the Courts of Justice in Scotland, are called *Sessions*. There are two of them in the year, the *Summer and the Winter Sessions*.

† Mr Dundas of Arniston, afterwards Lord President of the Court of Session; the same who is mentioned above in the trial of Carnegie of Finhaven.—The circumstances of this trial which do not appear upon record, were communicated to me by his son the Lord President, of whose faithful memory I have more than once had occasion to see the most unequivocal proof. He learned those circumstances in repeated conversations with his father, and the Lord President Forbess.

tertained a ſtrong perſuaſion.—The ſolemn and animated addreſs of the counſel made a forcible impreſſion upon the Court, and their Lordſhips delayed the cauſe till the Winter Seſſion. 1726

During the vacation, a ſingular coincidence of circumſtances occurred, which was the the means of vindicating Henderſon's innocence, and of detecting a profound ſcheme of fraud, no leſs ingeniouſly contrived, than dexterouſly executed: And this diſcovery, his Majeſty's Advocate and Solicitor General, in their pleadings before the Court, publicly attributed to Providence.

The Lord Advocate, when going north to his houſe of Culloden, paid a viſit to Mr Roſe of Kilravock.—Mr Roſe ſhowed his Lordſhip a houſe he was building; and, happening to miſs one of the carpenters whom he thought an expert workman, he aſked the overſeer, What was become of him? The overſeer taking Mr Roſe aſide, bid him take no further notice of this; for the young man, upon hearing that the Lord Advocate was to be at Kilravock, declared it was high time for him to leave the country; and that he would immediately go to Aberdeen, and take ſhipping for London.—This Mr Roſe communicated to his Lordſhip, who aſked the overſeer the carpenter's name, and, if he knew of any crime that the carpenter had committed? The overſeer anſwered, *that the man's name was David Houſehold, and he ſuſpected the crime was being acceſſory to ſome forgery.* The Lord Advocate immediately deſpatched a meſſenger to Aberdeen, who apprehended Houſehold, and carried him priſoner to Edinburgh.

Upon the commencement of the Winter Seſſion, Houſehold being brought before their Lordſhips, and examined, depoſed,

 That

1726 of the *Summer Seſſion* *, repreſented to the Court, that, as the evidence given muſt have eſtabliſhed with their Lordſhips a conviction of Mr Henderſon's guilt, the duty of his office required it of him, to aſk their Lordſhips to pronounce a decree, finding the bill drawn upon the Ducheſs of Gordon, to be forged by the priſoner Henderſon ; and therefore remitting him to the Court of Juſticiary, that he might ſuffer a capital puniſhment.

The counſel for Mr Henderſon urged † in his defence, that notwithſtanding the direct teſtimony which was given by ſeveral witneſſes, of his having granted the obligation relative to the forged bill ; yet, having viſited him in priſon, and repeatedly examined him in private, in the moſt ſolemn manner, the ſimplicity, uniformity, and ſteadineſs of his anſwers to the counſel's interrogatories, gave the latter, if not a perfect conviction, at leaſt a ſtrong belief, that Henderſon was truly innocent.—The counſel therefore requeſted of their Lordſhips, that they would not be haſty to embrace, nor reſolute to conclude, a decided opinion of Henderſon's guilt ; for that even procraſtination was not a fault, when the life of a man was at ſtake. And he entreated their Lordſhips to ſpare his feelings of the pain it would give them, to ſee a ſentence pronounced on almoſt the laſt day of a *Seſſion*, which was to be the foundation of a capital puniſhment being adjudged to a man, of whoſe innocence he ſtill entertained

* The terms of the Courts of Juſtice in Scotland, are called *Seſſions*. There are two of them in the year, the *Summer and the Winter Seſſions*.

† Mr Dundas of Arniſton, afterwards Lord Preſident of the Court of Seſſion ; the ſame who is mentioned above in the trial of Carnegie of Finhaven.—The circumſtances of this trial which do not appear upon record, were communicated to me by his ſon the Lord Preſident, of whoſe faithful memory I have more than once had occaſion to ſee the moſt unequivocal proof. He learned thoſe circumſtances in repeated converſations with his father, and the Lord Preſident Forbeſs.

tertained a ſtrong perſuaſion.—The ſolemn and animated addreſs of the counſel made a forcible impreſſion upon the Court, and their Lordſhips delayed the cauſe till the Winter Seſſion. 1726

During the vacation, a ſingular coincidence of circumſtances occurred, which was the the means of vindicating Henderſon's innocence, and of detecting a profound ſcheme of fraud, no leſs ingeniouſly contrived, than dexterouſly executed: And this diſcovery, his Majeſty's Advocate and Solicitor General, in their pleadings before the Court, publicly attributed to Providence.

The Lord Advocate, when going north to his houſe of Culloden, paid a viſit to Mr Roſe of Kilravock.—Mr Roſe ſhowed his Lordſhip a houſe he was building; and, happening to miſs one of the carpenters whom he thought an expert workman, he aſked the overſeer, What was become of him? The overſeer taking Mr Roſe aſide, bid him take no further notice of this; for the young man, upon hearing that the Lord Advocate was to be at Kilravock, declared it was high time for him to leave the country; and that he would immediately go to Aberdeen, and take ſhipping for London.—This Mr Roſe communicated to his Lordſhip, who aſked the overſeer the carpenter's name, and, if he knew of any crime that the carpenter had committed? The overſeer anſwered, *that the man's name was David Houſehold, and he ſuſpected the crime was being acceſſory to ſome forgery.* The Lord Advocate immediately deſpatched a meſſenger to Aberdeen, who apprehended Houſehold, and carried him priſoner to Edinburgh.

Upon the commencement of the Winter Seſſion, Houſehold being brought before their Lordſhips, and examined, depoſed,

 That

1726 That in the beginning of the year, he, at the desire of Mrs M'Leod, wrote the bill produced in process *, which she dictated to him; and he in particular, did write the name of George Henderson, both as drawer and indorser; but the word '*Gordon*' he did not write. At another time Mrs M'Leod carried him to a gardener's house without the Water-gate, at the foot of the Canongate; but, before taking him there, she put on him a coat belonging to her husband, and a black knotted periwig, and told him, that she was to bring him into the company *of two honest men, before whom he must personate George Henderson.* The deponent did as she desired; and, in the gardener's house at the Water-gate, she dictated to him a part of the obligation produced in process.—Thereafter, she took him to a wright's house in the Canongate, on the south side of the street, a little below the Earl of Moray's, and there, in presence of the wright, and of a boy called Dempster, Mrs M'Leod dictated, and the deponent wrote the remaining part of the obligation, and subscribed it with the name of George Henderson, in presence of the wright, and of Dempster, who subscribed as witnesses. The letter produced in process from George Henderson to William Petrie, being likewise shown to the deponent, he deposed, That he wrote it also at the desire of Mrs M'Leod, who dictated the same to him; and this happened before he wrote the obligation mentioned above. Deposed, That, after Mrs M'Leod was put in prison, a Highlandman came to him, and said, that he was sent by Mr M'Leod, Mrs M'Leod's husband, to persuade him to abscond on account of those papers he had written. This he thought unnecessary, as he wrote them at the desire of another, and

* The Lord Advocate has often been heard to say, That had his rash desire been complied with, and Henderson executed, and his Lordship had learned the facts which afterwards appeared, he should have looked upon himself as guilty of murder.

and was ' *altogether ignorant of the import of ſaid writings.*' 1726
But upon adviſing with ſome friends, he was convinced of his danger, and he abſconded and fled.

John Wincheſter, clerk to the comptroller of the cuſtoms at Leith, depoſed, That he was intimately acquainted with David Houſehold: That ſome time in May laſt, the deponent went to ſee Houſehold, who was then working aboard Captain Marſham's ſhip, which was lying in Leith harbour; but was told that Houſehold was not to be found. He called a ſecond time, and the mate of the ſhip brought Houſehold to him. The deponent aſked, What was the matter with him? He anſwered, That he was obliged to hide himſelf; for Mrs M'Leod had induced him one day to go to a houſe in the Canongate with her, and there to write out a bill for her for about L. 50, or L. 60, in preſence of two witneſſes; but the deponent does not remember what he ſaid about ſubſcribing the bill. Depoſed, That he ſaid to Houſehold, " He would be hanged for ſo doing;" to which Houſehold anſwered, He was reſolved to fly; and added, that he had got a meſſage from Mrs M'Leod's huſband to abſcond. The deponent aſked him, If it was on account of this bill that Mrs M'Leod was put in priſon? ' To which he anſwered, That it was the very ſame.'—The bill, letter, and obligation in proceſs, being ſhown to the deponent, depoſed, That he was well acquainted with Houſehold's hand-writing; and he believed the ſaid deeds to be written by him.

Archibald Dempſter, a preceding witneſs, being re-examined, and his former depoſition read over to him, depoſed, That nobody inſtructed him as to what he was to ſay in that depoſition, nor promiſed him any reward on that account.—*Being confronted*

1726 *ted with Henderson* at the bar, and with David Household*, and
'being desired to look narrowly upon the said David, and upon 'George Henderson at the bar, in order to declare upon oath 'which of the said two was the person who wrote and subscribed the obligement in the house of John Gibson, mentioned by 'the deponent in his former oath, deponed, *That he did believe 'that the said person was said David Household, and not George 'Henderson.*'

The second part of this profound plot being performed, and the 'plot detected,' it remained now but for public justice to bring the matter to a catastrophe.—Upon the eighth of December, the Lord Advocate represented to the Court, that it was manifest that the Duchess of Gordon's bill was a forgery: That it was evident from the proof that Henderson was *innocent of the forgery*, who therefore ought to be acquitted; and that Mrs Macleod was guilty, *art and part*, of the same, as well as of counterfeiting the letter and obligation produced in process. This, his Lordship said, was established by Household, who, at the desire, and by the contrivance of Mrs Macleod, actually forged the deeds;—by Dempster, who, in his second deposition, ingenuously and satisfactorily accounted for the mistake into which he was led in his first, by the artful contrivance of Mrs Macleod;—by comparing the deeds produced with the hand-writing of Household taken down in their presence;—and by the evidence which Henderson had led of an *alibi*. He added, that she had formed a malicious intention to hang her neighbour, and it was but just she should fall into her own snare.—Upon the whole, his Lordship

* The Lord Advocate made the great black knotted wig be taken off Henderson and put upon Household, to refresh his perceptive as well as recollective faculties. He also made Household take a pen and write Henderson's name before them, to establish, *ex comparatione literarum*, whose hand-writing the deeds really were.

ſhip obſerved, that, by her artful and horrid contrivance, Mrs Macleod had well nigh made 'an innocent man ſuffer death. 1726
'That this contrivance was, by the good providence of God, 'diſcovered: And concluded, that therefore, the ſaid Mrs Mac-'leod was guilty, *art and part*, of forgery, and ought to ſuffer 'the pains of death.' The Solicitor General * added, 'that 'there was ſuch a horrid deſign, and ſo artfully laid, *that, at 'firſt, he did firmly believe Henderſon guilty, nay, and could appeal 'to all, if by good providence, Houſehold had not been apprehended, 'they had not condemned Henderſon.*'

The defences which Mrs Macleod's counſel † urged in her behalf reſpected the nature of the crime and the evidence of her guilt. The nature of her crime, it was alledged, was not an intent to defraud the Ducheſs of Gordon of any money; neither, in fact, was her Grace, or any other perſon, defrauded. The ſole purpoſe was to uſe the deed as a fund of credit for raiſing a pittance of money, which ſhe applied to the moſt pious of purpoſes, the relieving her huſband from a priſon. And, as to the ſubſequent part of her alledged conduct after it came to be diſcovered that the bill was forged; whatever might be the *reſult*, the *intention* was not *malice* againſt Henderſon, but a deſire to ſave her own life, and therefore was a ſpecies of ſelf-defence, which greatly alleviated her ſuppoſed guilt, according to the brocard, '*licet unicuique ſanguinem ſuum redimere qualiter qualiter.*' The evidence of her guilt, again, was the teſtimony of but one witneſs, which, although it might be entitled to ſome credit in a civil cauſe, could be no ground for proceeding upon in a matter of life and death. And how far this witneſs was deſerving of any credit with their Lordſhips,

* Mr Charles Erſkine, afterwards Lord Juſtice Clerk.

† Mr Robert Craigie, afterwards Lord Preſident of the Court of Seſſion.

1726 Lordſhips, let his public infamy, of which he himſelf ſtood recorder, determine; for he had placed himſelf in ſo ſingular and unequivocal a point of guilt, that whether his teſtimony was true or falſe, it branded him with equal infamy. Neither was Dempſter's evidence to be regarded, as his firſt and his ſecond depoſitions were repugnant to each other. As for the argument of Henderſon's *alibi*, which was now had recourſe to, it had grown the better for the keeping; for at the end of the Summer ſeſſion, it ſurely had no weight with the Lord Advocate, when, notwithſtanding of it, his Lordſhip moved, that *Decreet of Reduction and Improbation* ſhould be pronounced, and Henderſon as the guitly perſon, remitted to the Court of Juſticiary. Farther, the witneſſes who depoſed to what is pleaded on as an *alibi*, admit that Henderſon was frequently out of the room, and that perhaps, for a quarter of an hour together; and how natural it was for comrades over a bottle to think *a whole hour but a quarter*, would readily be admitted. Upon the whole, as the teſtimony of ſuch a perſon as Houſehold was ſo little worthy of making faith in judgment; and as there was no preciſe puniſhment by our law annexed to the crime of forgery, but it remained with their Lordſhips to adapt the extent of penalty to the degree of guilt, he hoped they would either acquit Mrs Macleod, or at fartheſt ſubject her to an arbitrary puniſhment.

The Court found that Mrs Macleod was 'guilty, *art and part*, 'of the ſaid forgeries.' They reduced the deeds, remitted Mrs Macleod to the Court of Juſticiary, acquitted Mr Henderſon, and diſmiſſed him from the bar.

Mrs Macleod was then ſerved with a criminal indictment at the inſtance of his Majeſty's Advocate, ſetting forth, that, by the law and practiçe of this kingdom, the crime of forgery, or the being

being *art and part* thereof, or the uſing of forged deeds, was 1726
puniſhable with 'death, and confiſcation of moveables, and other 'pains of law:' That nevertheleſs, Mrs Macleod had been guilty of all, or one, or other, of theſe crimes, in ſo far as ſhe had forged a bill upon the Ducheſs of Gordon, &c. &c. That the Court of Seſſion had pronounced a ſentence, declaring the bill, &c. to be forgeries, and that the priſoner was *guilty*, *art and part*, of the ſame, and therefore remitting her to the Court of Juſticiary: And that the extracted, *i. e.* authenticated, decree of the Court of Seſſion, was lodged with the clerk of the Court of Juſticiary. 'All which, or any part thereof, being found proven 'againſt her,' ſhe ought to be puniſhed with the pains of death.

The priſoner and the public proſecutor were heard by counſel. It was objected for her, that forgery, by the law of Scotland, did not infer a capital puniſhment: That ſhe was not accuſed of having actually committed the forgery, but only of being *art and part:* That ſhe had not uſed the bill with an intent to defraud, but merely as a fund of credit for a ſmall ſum of money, which ſhe meant honeſtly to repay; and that the decree of the Court of Seſſion was neither to be held as determining the relevancy of the indictment, nor as *probatio probata*, or evidence not to be controverted of the priſoner's guilt. Informations for both parties were alſo lodged by order of the Court. But as the defences ſtated for the priſoner were over-ruled; and as theſe general points of law, and of form, are now eſtabliſhed by the ſubſequent practice of more than half a century, it is needleſs for me to ſtate the arguments which they contained.

The Lords pronounced an interlocutor, repelling the defences ſtated for the priſoner, and finding her being guilty of forging any of thoſe deeds, or that 'ſhe was art and part thereof, relevant

'to

1726 'to infer the pains of death.' The Solicitor General then produced the 'Decreet of Improbation obtained before the Lords of 'Seffion, and craved that the fame might be read openly,' which was done accordingly. The decree being read, the Court ordered the affize inftantly to inclofe. The jury returned a verdict, unanimoufly finding the indictment proved, and the prifoner 'guilty, art and part, of the crimes libelled.' The Court adjudged the prifoner to be hanged on the eighth of March.

If Mrs Macleod fhowed art in the contrivance, and dexterity in the execution of this fraud, fhe difplayed no lefs fortitude in undergoing the punifhment, which refulted from a perverted application of fo much ingenuity. She went to the place of execution dreffed in a black robe and petticoat, with a large hoop, a white fan in her hand, and white farfenet hood on her head, according to the fafhion of the times. When fhe came upon the fcaffold, fhe put off the ornamental parts of her attire, pinned a handkerchief over her breaft, and put the fatal cord about her neck with her own hands. She perfifted to the laft moment in the denial of her guilt, and died with the greateft intrepidity.

OF

OF BREAKING OF GARDENS.

John Rait and Alexander Dean for breaking of Gardens.

THE prisoners were indicted at the instance of his Majesty's Advocate for breaking into the gardens of Barnton *, Pilton, Barnbougle, Greycrook, Craigie-hall, and Carlowry, and stealing thence herbs, artichock plants, *sybows*, *i. e.* young onions, and bee-hives. They had formerly been convicted before an inferior judicature, for breaking gardens in the neighbourhood of Musselburgh; and by warrant of the Privy Council, which was produced in Court, they were sentenced to be taken to the Burrow-Muir of Edinburgh, and there hanged. 1623

* Records of Justiciary, July 11. 1625.

OF INCEST.

Alexander Blair taylor in Currie.

1630 ALEXANDER BLAIR, taylor in Currie, was criminally prosecuted by his Majesty's Advocate for incest *. The fact charged against him was, that he had carnal knowledge of one Catherine Windrahame, *his first wife's half brother's daughter.* And being admonished by the kirk to abstain from this connection, instead of yielding obedience, he fled to England with the woman, and there married her. The jury unanimously found him guilty, and the court ordained him to be beheaded.

James Wilson coal-grieve at Bonhard.

1649 THE prisoner was tried before Mr Alexander Colvil Justice-depute, at the instance of Mr Thomas Nicolson, his Majesty's Advocate. The indictment accused him of having committed incest with Janet Carse, daughter of Agnes Brown his wife †, *about thirty-five years since, or thereabout*, his wife being then alive; also, of having committed adultery with Jean Walker during the lifetime of his said wife.

The

* Records of Justiciary, September 9. 1630. † Records of Justiciary, December 20. 1649.

The prisoner with great penitence confessed his guilt before the Court and jury; and a verdict being returned against him, the Court ordained him to be taken on the next day to the Castle-hill and beheaded, and his personal estate to be forfeited. 1649

William Dryſdale and Barbara Tannahill.

WILLIAM DRYSDALE and Barbara Tannahill were ſerved with ſeparate indictments, accuſing them of having committed inceſt with each other. The crime libelled was, that the priſoner William Dryſdale, a widower, (whoſe wife, a ſiſter of the other priſoner, had been dead for two years), had layen with the ſaid priſoner, Barbara Tannahill *: And that, by an act paſſed in the reign of King James VI. parl. 1. chap. 14. and by the 18th chapter of Leviticus, this crime inferred the pain of death. —The charge againſt Barbara Tannahill was the ſame, *mutatis mutandis*. 1705

Informations, neither ingenious nor elaborate, were lodged for and againſt the priſoner, Dryſdale. The Court repelled the defences, and found the libel relevant.

THE PROOF.

Barbara Tannahill judicially confeſſed that ſhe had layen one time only with the other priſoner, Dryſdale, and that ſhe was now with child by him.

Qq 2 Mr

* Records of Juſticiary, 8. 22. January, March 12. June 11. 1705.

1705 Mr Samuel Semple minister at Liberton deposed, That Barbara Tannahill *confessed her guilt before him and the kirk-session*; and that he interrogated the other prisoner Drysdale, who expressly disavowed the charge.

Robert Hardie deposed, That one evening going by the house where the prisoners lived, he heard Barbara Tannahill's voice calling out, once and again, '*O dear!*' and did hear the other prisoner using expressions of entreaty, or rather of violence, towards her. And that the prisoners lived in a house by themselves.—Two other witnesses swore to Tannahill's confession, and Drysdale's denial, of guilt: That Drysdale's wife had been dead for two years; and that the prisoner, Tannahill, was her sister.

The jury found the indictment proved against Tannahill, but found nothing proved against Drysdale but the woman's 'judicial confession, which is a great presumption of his guilt.'—The Court adjudged Tannahill to be hanged, and Drysdale to be banished for life.

Even according to the Mosaick law these unfortunate persons could not have been legally convicted, and the Scottish statute * declares the Mosaic law, as laid down in the 18th chapter of Leviticus, to be the rule for determining incest. In the information for his Majesty's Advocate against the prisoner Drysdale, an unwarrantable and absurd extension of this crime was attempted.—That as it is there commanded, Thou shalt not lie with *thy brother's wife*, so from the degrees of affinity being the same, the command must likewise be *understood* to be, Thou shalt

* James VI. parl. 1. c. 14.

ſhalt not lie with *thy wife's ſiſter*. To this it may be anſwered, 1705
—1*mo*, That to ſuppoſe a penal law reaching life not to be *expreſs* but *implied*, is to deem us to be governed not by law but by deſpotiſm. 2*do*, To lie with a brother's wife occaſions an uncertainty as to the progeny. 3*tio*, To do ſo is not only inceſt but adultery. 4*to*, It is not commanded—Thou ſhalt not lie with thy brother's *widow*. 5*to*, This connection by affinity is diſſolved, and the ſurvivor is looſed by the death either of huſband or wife. 6*to*, This argument is completely illuſtrated by the command in a ſubſequent verſe of the ſame chapter,—Thou ſhalt not *vex* thy wife * by lying with her ſiſter in her ..... *lifetime*. 7*mo*, To marry a brother's widow was an expreſs injunction of the law of Moſes; and if the ſurviving brother declined the match, the widow was entitled by that elegant and dignified ſyſtem of juriſprudence to—*ſpit in his face* †.—Theſe arguments however were either omitted or over-ruled.

A rancorous deteſtation of irregular commerce between the ſexes, has diſtinguiſhed thoſe religious ſects which pretend to an uncommon degree of ſpiritual purity, and in a peculiar manner the rigid diſciples of Calvin. Indeed, the Apoſtle ‡ to whoſe myſterious doctrines they are peculiarly attached, has barely tolerated the giving obedience to that impulſe, with which nature has directed every animal to the propagation of its ſpecies.

The

* The words are ſtill more diſtinct and forcible in the *vulgate*, or St Jerome's tranſlation, than in the Engliſh edition of the Bible. 'Sororem uxoris tuae *in pellicatum illius* non accipies, nec revalebis turpitudinem ejus, *adhuc illa vivente*.' Biblia Pariſiis ex officina Stephani e regione Scholae Decretorum, MDXX. Leviticus, c. 18. Here the words truly expreſs the ſenſe '*in pellicatum illius*,' being adultery againſt her.

† Deuteronomy, c. 25. v. 9.

‡ 1ſt Corinthians, c. 7.

1705 The inſtructive page of hiſtory, and the fatal warnings recorded in criminal courts, ſufficiently evince what public miſchief, what private conflict, what dark and atrocious crimes have proceeded from a miſtaken notion of religion, inculcating a perpetual warfare with the dictates of nature.

The preſervation of morals, by debarring a union between perſons whoſe frequent opportunities pave the way to debauchery—The preventing a perplexity in the degrees of kindred—Perhaps alſo, the preſerving a ſtrong and healthy breed, have induced civilized nations to prohibit as inceſtuous, commerce between perſons nearly connected by *conſanguinity*. It does not appear that the ſame reaſons apply to the debarring ſuch union between thoſe who are connected by *affinity*.—After the huſband is dead, the wife ſurely is not guilty of adultery by entering into a ſecond marriage; for, '*if the huſband be dead* *, *ſhe* '*is looſen'd from the law of her huſband*.' If ſo, I do not perceive how the connection thus diſſolved by death, can imply againſt the ſurvivor, the crime of *inceſt*, any more than that of *adultery*.

A more rigid degree of Calviniſm than what now prevails, was eſtabliſhed in the reign of William. The judicatories of the church poſſeſſed a juriſdiction. The ſlighteſt informalities between the ſexes excited zealous abhorrence. To avoid the diſgrace of the *repenting-ſtool*, many a miſerable wretch dared a guilt which was to be expiated by the pain and ignominy of the *gallows*. The Preſbyterian † clergy, in matters of ſcandal and of witchcraft,

* Romans, c. 7. v. 2.

† Original precognition taken before the ſheriff-depute of Roſs, June 23. 1720, againſt Helen Bowie and Janet Thomſon for witchcraft, at the inſtance of 'Mr David Roſs miniſter of the goſpel at Tarbatt,

witchcraft, arrogated to themselves the office of public prosecutors, of inquisitors general; and so late as the 1720, the ministers, *in behalf of themselves and their kirk-sessions*, publickly exercised this office in our courts of justice. Their busy zeal in hunting out after young women whom they suspected of being with child, and after old women who lay under the imputation of witchcraft, was productive of the most dismal consequences. In the one case, their persecution was directed at unhappy women who *had obeyed the impulse of nature*; in the other, at those who incurred the imputation of doing what *nature rendered it impossible for them to do*. In both, the pains and the piety of the clergy were productive of the same issue, the driving miserable creatures to the gallows.—And the recorded convictions before the Court of Justiciary at Edinburgh, of *twenty-one women for child-murder*, and three men *pro venere nefanda cum brutis animalibus*, in the space of seven years*, afford a melancholy proof that the insulted dictates of nature, when checked in their regular course, will burst forth in a torrent that will sweep away every feeling of humanity, and every sentiment of virtue. 1705

OF

'batt, *in behalf of the session of the said parish*,' in possession of the Right Honourable Robert Dundas of Arniston, Lord President of the Court of Session.

* From A. D. 1700 to 1706, inclusive.—See Rec. of Just.

OF ADULTERY.

John Guthrie for notour, i. e. *notorious Adultery.*

1617 ADULTERY was first made capital in Scotland by act of Parl. 1563. chap. 74. The thunder of the law in the statute immediately preceding, had been hurled against witchcraft; and an act passed in the present century, 'ratifies and revives all 'former laws and acts against drunkenness, Sabbath-breaking, 'swearing, fornication, adultery, and all manner of uncleanness;' and it specially and expressly revives * the act above mentioned against adultery. Notorious, or *notour* adultery, is, *1mo*, When children are procreated between adulterers; *2do*, When they are publicly known to sleep with each other; or, *3tio*, When being suspected of adultery, and admonished by the Kirk to refrain from the vice, and to do penance for the scandal; yet refusing obedience, they are excommunicated for the same. James VI. Parl. 7. chap. 105.

John Guthrie was prosecuted for the crime of notorious adultery. He was accused of having married a wife in the shire of Forfar, and deserted her †; of having afterwards come to Leith; of having laid aside the name of Laird, which he bore in Forfar, and assumed that of Guthrie, and there marrying another wife, with whom he cohabited for several years; and also, of committing adultery with another woman. *These facts he acknowledged*

* William, Parl. 1. Ses. 8. c. 11. *It is a fortunate maxim in our jurisprudence, that statute law prescribes.*

† Rec. of Just. 14th March, 16th April 1617.

ledged before the Kirk-session of Kirkliston, and did penance in sackcloth for his impurities.—Being thus detected and stigmatized by the church, the secular arm was next stretched forth against him. A warrant under the royal sign manual, dated at Whitehall, 26th of January 1617, was directed to the Lord Justice General, and the other Justices. It set forth, that the King's Advocate, by his Majesty's express command, was about to prosecute the prisoner for the crime of notorious adultery, and required the Justices instantly, on his conviction, to condemn him to death. The Court had the humanity not to enter this warrant upon record till about a month after the prisoner's conviction, when it sentenced him to be taken to the Cross of Edinburgh, and hanged on a gibbet till he be dead; and he appears to have been carried to immediate execution. 1617

Two other persons, Alexander Thomson and Janet Cuthbert, were also, by royal warrant, tried for adultery on the same day with the prisoner, and were convicted. But the King was pleased to direct, that out of his *princely clemency*, they should not be put to death, but banished.

Patrick Robertson and Marion Kempt for Adultery.

THE prisoners were accused of adulterous commerce with each other; the fruits of which were, Marion Kempt's bearing three children to the said Patrick *.—They were also charged with the said Marion's having, with Patrick's knowledge and consent, 1627

* Records of Justiciary, 18th, 20th, December 1627.

1627 consent, taken poisonous drugs, by which her first child was killed in the womb. They were convicted on their own confession; and, on the 20th of the same month, were sentenced to be hanged on a gibbet at the Castle-hill.

John Fraser Writer in Edinburgh, for Adultery.

Counsel for the prosecutor, Sir George Mackenzie. *Counsel for the prisoner, Sir George Lockhart, &c.*

1673 THE prisoner was tried capitally for the crime of adultery, *at the instance of his wife*, and of Sir John Nisbet of Dirleton, his Majesty's Advocate. The fact libelled against him was simply, that, in absence of the private prosecutor, he had married another woman.

The prisoner's counsel urged in his behalf, that although the private prosecutor had a right of action to annull the second marriage, and to compel the adherence of the prisoner *; yet she had no title to prosecute him criminally, *ad vindictam publicam*, in a suit, in which if she prevailed, the husband whom she claimed must be bereft of his life.—That if any irregularity, or offence, has been committed by the prisoner, it was owing allenarly to the snares laid for him by his wife, the insidiousness of whose malice could only be parallelled by the effrontery of her prostitution.—The prosecutor having been equally public and promiscuous in her debaucheries, the prisoner had several years before been obliged to sue, before the Commissaries of Edinburgh, for a divorce from her; but, conscious of guilt and infamy, she had embarked

* Rec. of Just. 17th Nov. 1673. 12th Jan. 20th July 1674.

embarked on board a ſhip deſtined to carry felon's to Virginia, 1673
and the proſecution was ſuffered to drop. After having been abſent for a conſiderable time, a report of her death was circulated and believed, and what was at firſt *rumour*, became afterwards *evidence*; the ſhipmaſter, one of the ſeamen, and a paſſenger on board the ſhip, in which the proſecutor embarked, having given a teſtificate on oath, of her having died in Virginia. This teſtificate was laid before the Preſbytery of Edinburgh; and the clerk of the Kirk-ſeſſion was ordered to examine into the ſame. Having done ſo, he was ſatisfied by the granters, that the certificate was true, as well as authentic. This report being laid before the preſbytery, they authoriſed the proclamation of banns, which was regularly performed; yet no interruption was made to, no queſtion brought of the marriage, for upwards of four years.—And, at the end of this period, the proſecutor ſtarts up as from the dead, with a halter in her hand, menacing the priſoner.

It now appears that ſhe had lurked for great part of that time in Aberdeen, Dundee, &c. under the name of Mrs Gerard; *that ſhe had circulated the report of her own death*:—That, ſince her aſſumption of a feigned name, her life had been as profligate as before her embarking for Virginia. And that ſhe had brought forth three adulterous children, the unequivocal teſtimony of her ſhame and guilt; one of them, not ſix months preceding this very trial, which ſhe has brought in order to get her huſband hanged on a charge of adultery.—It was argued, that the proſecutor's *infidelity* to the marriage vows had given occaſion to the ſuit for a divorce, which the priſoner had brought againſt her before the Commiſſaries; and authoriſed the proceſs of recrimination before this Court, which the priſoner was immediately to inſtitute: *That this infidelity* would exclude the civil effects of a divorce, and much more ought to debar his wife from proſe-

1673 cuting the husband capitally for the very offence she had committed against him.—That she had laid a snare for him, by propagating rumours of her own death, and by lurking under a feigned name. Besides these defences, it was argued for the prisoner, that adultery could not be committed without consciousness, 'nam voluntas et propositum distinguant maleficia.' And the probable rumour, nay the direct certificate of the prosecutor's death, exempts from the suspicion of consciousness, and consequently from the crime of adultery, according to the case in the civil law, 'Mulier cum audisset absentum virum defunctum* 'esse, alii se junxit, et *falsis rumoribus* inducta, et quia verisimile est eam deceptam fuisse, nihil vindicta dignum videri potest.'

It was answered for the prosecutor, That *he* is an adulterer who lies with another woman while his wife lives; and, as rumour could not dissolve marriage, so neither could it defend against adultery; otherwise it were easy for any man who grew weary of his wife, to propagate reports of her death, and then to take advantage of the rumours he himself had fabricated. That even, if rumours were sufficient; yet these ought to be constant and universal; whereas, in this case, there was but one certificate, and it bore only, that *Margaret Haitly* died in Virginia, not that *Margaret Haitly*, *wife of John Fraser*, died in Virginia: That it was not *probable*, but *invincible* ignorance alone which could be excusable: That the prisoner had not made sufficient inquiry concerning his wife at her relations, and his ignorance was affected: That a long lapse of time must intervene; whereas here, there was but an absence of three years: That the prisoner ought to have executed a summons of adherence against his wife, which would have entitled him to a divorce;

* Digest. L. 11. § 12. de adulteriis.

vorce: That the presbytery of Edinburgh had not a jurisdiction competent to the dissolution of marriage; consequently their warrant was altogether insignificant. 1673

To this sophisticated reasoning the Court gave the sanction of its judgment, repelling the argument urged in behalf of the prisoner.

Nothing now remained but to lead a proof of the fact. The proof amounted solely to the prisoner's having married Helen Guthrie his second wife, and lived under the same roof with her as married persons. Even the consummation of the marriage is not proved, but is only matter of presumption. The jury by plurality of voices, viz. *nine to six, found the prisoner guilty.*

Margaret Haitly for Adultery.

IT was now Mrs Haitly's turn to stand trial for her life. On the same day with her husband she was prosecuted at his instance, and that of the Lord Advocate, on a charge of adultery with ten different persons specified in the indictment; and of having born three children, the fruit of her unlawful amours, the last of them not six months preceding.

The evidence of her criminal correspondence, and of the bearing three children in adultery, was complete; yet the jury, from what reason or motive I cannot conjecture, were not unanimous, but by a plurality of *eleven to four* found the prisoner guilty. It

1673 was not however '*the feet of them which buried her husband that* '*carried her out.*'

The Court delayed from time to time pronouncing sentence upon the prisoners. On the 20th of July after, John Fraser was set at liberty, in consequence of having obtained his Majesty's pardon. The other convict Haitly still remained a prisoner; but after a minute and painful examination of the records, I have not been able to discover whether she was kept prisoner for life, or what became of her.

John Murdoch and Janet Douglass for Adultery.

1699 JOHN MURDOCH and Janet Douglass, both of them married persons, inhabitants of Edinburgh, were tried capitally at the instance of his Majesty's Advocate, not for *notour* *, but for simple adultery, *i. e.* for one act of adultery. Informations were lodged for the prosecutor and the prisoners. The King's Advocate restricted the libel to an arbitrary punishment. The prisoners threw themselves upon the King's will, and were banished for life, never to return under pain of death.

If the frequency, variety, and severity, of criminal prosecutions can establish the purity of statesmen and judges, this surely was an age in which persons in public office could boast of a very

* Records of Justiciary, September 14. November 6. 1699.

very uncommon degree of purity and virtue. In this case, such was the zealous detestation of vice, that persons were indicted capitally for simple adultery, although neither by the statutory law, nor the judgments of the criminal courts, was simple adultery ever deemed capital. A few months preceding this trial, the Court of Justiciary entered on its journals * a recommendation to the King's Advocate to prosecute witches. About the close of that century too, a man was hanged for murder, although the jury found that the prisoner in defending himself had killed the deceased. Another was hanged for expressing in conversation, opinions on religion and philosophy opposite to those of the times. A third was tried for high treason, for engraving a political print, but acquitted by the jury. Others suffered death also, when perhaps their trials had better been omitted. 1699

OF

* Records of Justiciary, March 27. 1699.; November 21. 1695; December 24. 1696.; July 10. 1699.; April 14. & 22.; May 24. 1701.; July 10. 1699.

OF FORNICATION.

Christopher Little and Margaret Jameson for fornication, and theft, charged against them in one indictment.

1653 AFTER the abolition of Popery, and establishment of the Confession of Faith by authority of parliament, one of the first acts of the legislature was to annex a punishment to '*the filthie vice of fornication.*' The punishment was for the first offence, to pay a fine of L. 40 Scots, (and upon failure of payment * to undergo eight days imprisonment, and to be fed upon bread and water), and to stand two hours upon the pillory. For the second offence the fine was raised to 100 merks; and besides being put upon the pillory, the convict was to have *his or her* head shaved. And for the third offence the pecuniary mulct was augmented to L. 100 Scots, and the convict was ordained to be thrice ducked in the deepest and foulest pool in the parish, and then to be banished from the same for ever. And this zealous act has been renewed so late as A. D. 1696.

On the 16th of October 1652, a commission was produced in the Parliament house at Edinburgh, from the commissioners *of the Parliament of the Commonwealth of England*, and recorded in the books of Justiciary, appointing George Smith, John March, Andrew Owen, and Edward Mosley, Esquires, or any two of them, commissioners for the administration of justice to the people of Scotland in causes criminal.

On

* James VI. parl. 1. chap. 13.; William, parl. 1. sess. 6. chap. 31.

On the 21ſt of June 1653, Henry Whallie, Advocate General *, proſecuted Jean Hamilton, Chriſtopher Little, and Margaret Jameſon, before the Honourable George Smith and Edward Moſley, two of thoſe commiſſioners. The priſoners were charged in the indictment with 'being all three acceſſory, art and 'part, of ſtealing ſhirts and ſheets forth of the houſe of Eliſa- 'beth Potter widow in Newhaven, after the ſaid Jean Hamilton 'her theftuous upbreaking thereof, committed on the 6th day 'of May laſt: And the ſaid Chriſtopher Little and Margaret 'Jameſon for the crime of fornication committed by them with 'each other.' 1653

The priſoners, Little and Jameſon, denied the theft, but acknowledged the fornication, and ſubmitted themſelves to the mercy of the Court.

The jury, after hearing evidence, unanimouſly found the priſoners Hamilton and Jameſon, guilty of ſtealing the ſheets and ſhirts, and acquitted the priſoner Little of the ſame. They alſo unanimouſly found the priſoners Little and Jameſon guilty of fornication. The Court ſentenced Jean Hamilton to be ſcourged for theft from the Caſtlehill to the Netherbow, and then to be put into the Correction-houſe till farther orders; and ordained Little and Jameſon for fornication inſtantly to pay L. 40 Scots, and in caſe of refuſal to be kept priſoners for eight days, and fed on bread and *ſmall drink*, and next market day to ſtand an hour bare headed on the pillory; the priſoner Little then to be ſet at liberty, but Jameſon for the theft to be put in the Correction-houſe.

* Records of Juſticiary, October 16. 1652. June 24. 1653.

OF BLASPHEMY.

Thomas Aikenhead for denying the Trinity, and the authority of the Scriptures, and for maintaining the eternity of the World.

1696 THE *pious* Charles II. being reſtored to the throne of his anceſtors, He and his *upright* * adminiſtration ſet themſelves about the great works of religion and morality.

A Parliament worthy of ſuch a King and ſuch a miniſtry having accordingly, in contradiction to, and contempt of, the principles of a great body of the people, veſted the King with a power of eſtabliſhing any form of Church government he choſe †, it proceeded next to enact ſtatutes againſt Sabbath-breaking, ſwearing, drinking, and other profanities and immoralities.—Theſe pious laws being made, another immediately followed, annexing the pain of death to the railing againſt God, or any of the perſons of the Trinity, or denying them, and obſtinately perſiſting therein.

I have hitherto diſcovered but three proſecutions for the crime of blaſphemy. The firſt was that of a woman who was tried before the Circuit Court of Juſticiary at Dumfries, A. D. 1671. But,

* See an inſtance of the *recorded perjuries* of the great officers of ſtate to rob a man of his life; Arnot's Hiſtory of Edinburgh, p. 149. † Charles II. parl. 1. ſeſſ. 1. acts 16. 18. 19. 21.

But, as the records of the circuit courts previous to this century are loſt, all I can ſay of the matter is, that the act * of blaſphemy charged againſt the priſoner was her drinking the Devil's health; that the Court did not find it relevant to infer the crime of blaſphemy, but fined the woman in the ſum of 500 merks for the offence. The ſecond proſecution was againſt Francis Borthwick. 1696

Francis Borthwick, ſecond ſon to James Borthwick of Harelaw, was ſerved with a criminal indictment for blaſphemy, at the inſtance of his Majeſty's Advocate, and of James Cockburne in Dudingſtone, *informer againſt him.* As he did not chooſe to run the riſk of a trial, ſentence of outlawry was pronounced againſt him for his contempt and diſobedience. It ſet forth, That he had been often cited to appear that day before the Court of Juſticiary to anſwer to a charge of blaſphemy: That he was born of Chriſtian parents, baptiſed and educated in the Chriſtian Church, and continued in the profeſſion of Chriſtianity, and in communion of the *Chriſtian Catholick Church* till the fourteenth year of his age: That he then went abroad to follow the buſineſs of a merchant, and was ſeduced to a ſhameful apoſtacy from the moſt holy faith, and to profeſs himſelf openly *to be a Jew, and that he was circumciſed:* That upon his return to Scotland, he at Edinburgh, and in the neighbourhood thereof, did rail againſt our Lord and Saviour Jeſus Chriſt ‡, denying him to be God, and affirming him

* Mackenzie's Criminal Trials, tit. 6. § ult. Our Scandinavian anceſtors uſed to pour forth immoderate libations to the health of their Gods; hence, when the Pagan religion yielded to the doctrines of the Goſpel, in Germany, and ſeveral northern nations, the Church found it prudent to indulge the people with a bumper to the health of our Saviour, the apoſtles, and the ſaints; Mallet's Northern Antiquities, vol. 1. p. 137.

‡ Records of Juſticiary, June 15. 1681.

1696 him to be mere man, and a falſe prophet, and outrageouſly reviling him by ſuch other blaſphemies as were not fit to be uttered; renouncing and curſing the holy ſacrament of his baptiſm, and imprecating vengeance upon himſelf if ever he ſhould return to the Chriſtian religion.—If the accuſed was truly mad enough to undergo circumciſion, he was at leaſt not ſo mad as to appear before the Court of Juſticiary; and ſentence of outlawry was therefore pronounced againſt him.—The laſt trial for blaſphemy was that of Thomas Aikenhead.

Thomas Aikenhead appears to have been about twenty years of age; his father *, who had been a ſurgeon in Edinburgh, was dead. Sir James Stewart, his Majeſty's Advocate, by ſpecial order of the Privy Council, ſerved him with a criminal indictment † before the Court of Juſticiary for blaſphemy. The libel ſets forth, that blaſphemy againſt God, or any of the perſons of the bleſſed Trinity, *or againſt the holy ſcriptures*, *or our holy religion*, is a crime of the higheſt nature, and ſeverely puniſhable by the laws of God, by thoſe of this and every well governed realm, and particularly by acts of parliament, Charles II. parl. 1. ſeſſ. 1. chap. 21.; and by William, parliament A. D. 1696, ſeſſ. 5. c. 11.

That notwithſtanding, the priſoner had repeatedly maintained, in converſation, that theology was a rhapſody of ill invented nonſenſe,

* I have diſcovered an anecdote concerning the priſoner's father. He was cited before the Privy Council on the 20th April 1682, for ſelling amorous and provocative drugs, by which it was alledged that a woman would have loſt her life, had not one Doctor Irvine given her an antidote. The Privy Council referred the caſe to the College of Phyſicians, and the College ſagaciouſly reported, *that it was unſafe to uſe ſuch medicines without firſt taking their advice*; Fountainhall, vol. 1. p. 183.

† Records of Juſticiary, December 23. 1696.

nonsense, patched up partly of the moral doctrines of philosophers, and partly of poetical fictions and extravagant chimeras: That he ridiculed the holy scriptures, calling the Old Testament Ezra's fables, in profane allusion to Esop's Fables: That he railed on Christ, saying, he had learned magick in Egypt, which enabled him to perform those *pranks* which were called miracles: That he called the New Testament the history of the impostor Christ: That he said Moses was the better artist and the better politician; and he preferred Mahomet to Christ: *That the Holy Scriptures were stuffed with such madness, nonsense, and contradictions, that he admired the stupidity of the world in being so long deluded by them:* That he rejected the mystery of the Trinity as unworthy of refutation; and scoffed at the incarnation of Christ, saying, that a *Theanthropos*, or God-man, was as great a contradiction as a *hirco-cervus*, or goat-stag, or that a *quadratum* was a *rotundum:* That he laughed at the doctrine of redemption: That he said the notion of a spirit was a contradiction: That he cursed Christ, and argued against the being of God, maintaining, *that God, the World, and Nature, are all one thing;* and that the World existed from all eternity: That he said the inventors of the scriptural doctrines would be damned, *if there was such a thing as rewards or punishments after this life;* and that Christianity itself would soon be extirpated: That his impiety was so audacious, that, as he passed by the Trone Church in a cold night, he said to a companion, he could wish to warm himself in the place Ezra called Hell: And, *lastly*, That he often uttered these or the like speeches within the last twelvemonth, without provocation, and merely from malice against God and Christ.

1696

The

1696 The Court found the railing against, or cursing any of the persons of the Trinity, relevant to infer the pains of death; and the other crimes relevant to infer an arbitrary punishment.

No counsel appeared for the prisoner; nor does it seem that one word was urged in his behalf during the course of the trial. Four or five witnesses were examined, one of them a writer in Edinburgh, the rest students at the University, lads from eighteen to twenty, or twenty-one years of age. They proved most of the articles of the libel, with this addition, that the prisoner said he was confident Christianity would be utterly extirpated by the year 1800. There was however a material defect in the evidence. The article most highly criminal, viz. the railing against God, and cursing our Saviour, was not proved at all, but was an inference drawn by the jury from the prisoner's cursing Ezra, and saying that the inventors of the scriptural doctrines would be damned, if there be such a thing as damnation.

The jury * unanimously found the prisoner guilty of railing against God, railing at and cursing Christ, and of the whole other articles in the libel. This verdict the jury, *even by the statute, were not warranted to pronounce.*—The railing against God, and cursing Christ, ought to have been facts directly proved, and not inferences drawn from cursing the inventors of scriptural

* The following men composed the jury: James Bouden late bailie of Edinburgh, George Clerk (chancellor, *i. e.* foreman of the jury) late bailie there, Michael Allan late dean-of-guild, Charles Chartres late bailie, Robert Forester late *kirk-treasurer*, Adam Brown (clerk) late bailie, Alexander Thomson late deacon-conveener, Jerom Robertson *periwig-maker*, James Maclurg late dean-of-guild, Patrick Thomson late treasurer, William Pattoune late bailie, Robert Elphinstoune of Lossness, George Mossman stationer, George Fullertoun. Five persons summoned on the jury refused to attend, and were fined 100 merks each.

ſcriptural doctrines; and as for denying any of the perſons of the Holy Trinity, it was not the denial, but obſtinately perſiſting therein, which by the ſtatute ſubjected the offender to a capital puniſhment. 1696

Beſides theſe defences, had the Court been endued with the humanity to appoint counſel for the priſoner, it would undoubtedly have been pled for him, that theſe were raſh words, drawn from him in the heat of controverſy, which by no means coincided with his ſerious notions; and that he heartily repented of the warmth which betrayed him into expreſſions ſo diſſonant from his own ſentiments, and ſo offenſive to the feelings of others.—Had theſe defences been offered for him, the jury could not, without being guilty of perjury, have convicted him of *obſtinately perſiſting to deny the Trinity*, which the ſtatute required.

The verdict was returned, and ſentence pronounced againſt the priſoner on *Chriſtmas Eve*, 'To be taken to the Gallow-lee 'on the eighth of January, between the hours of two and four 'in the afternoon, and to be hanged; his body to be buried at 'the foot of the gallows, and his moveable eſtate to be forfeit'ed.'—Mercy was aſleep*, as well as Juſtice and Science; ſo the dreadful ſentence was executed!

OF

* Two men were found guilty of houſe-breaking and robbery, attended with very aggravating circumſtances, ſome days before the priſoner. They were indulged in four weeks longer than him as to day of execution. Records of Juſticiary, December 22. 1696, January 4. 1697.

OF OTHER CRIMES AGAINST RELIGION AND THE STATE.

Trial of John Ogilvie Jesuit, for saying of Mass, acknowledging the Pope to be Judge in Controversies of Religion, and declining to answer certain questions put by his Majesty's Commissioners, concerning the Pope's power to excommunicate Kings, the murder of a King excommunicated and deposed by the Pope, and a Subject's being absolved from the allegiance due to such a King.

1615 JOHN OGILVIE, a Jesuit, was tried before the Magistrates of Glasgow; judges specially appointed for the trial by the Lords of Privy Council *. He was a priest equally devoid of the hypocrisy which characterises the most infamous, and the liberality which adorns the most enlightened of the clerical order. He possessed a considerable share of *acumen ingenii*; but his strong and clear intellect was strangely warped with bigotry.

The prisoner was born in the north of Scotland. He had been out of the kingdom for upwards of twenty years, and had returned

* A true relation of the proceedings against John Ogilvie, a Jesuit, &c. Edinburgh, printed by Andro Hart, A. D. 1615.—This account differs little in point of fact from that published at Douay, the same year, from a manuscript written by the prisoner, and continued by his fellow captives; except that the one, perhaps, suppresses, and the other may exaggerate his sufferings.

returned in the month of June preceding his trial. The public offence which he gave by the ſtatutory crimes of ſaying maſs, and of endeavouring to make converts to the Catholic religion, was aggravated by intemperate expreſſions of religious zeal; and as the priſoner had been lately in England, his indiſcreet language, joined to the recent conſpiracy of the gun powder treaſon, and the general odium which Papiſts laboured under, afforded a pretext to the abettors of kingly tyranny and of reformed zeal to inſinuate, that the priſoner might be embarked in ſome deſperate enterpriſe. 1615

Many prieſts had, of late, ſmarted under the rod of juſtice *; but the crown of martyrdom was reſerved for the priſoner. William Murdoch, in particular, for the *crime of ſaying maſs*, had been ſentenced to ſtand on the pillory, at Edinburgh, two hours, in his pontifical robes; then a fire to be kindled, and his robes and inſtruments of worſhip to be burned; and the prieſt to be tranſported and baniſhed his Majeſty's whole dominions for life, never to return under pain of death.

The priſoner was apprehended by order of the Archbiſhop of Glaſgow, (for in that city he chiefly ſculked) on the 4th of October 1614, and was next day examined before his Grace and the Biſhop of Argyle, and ſix other perſons of note.—He was required to take an oath, that he ſhould tell nothing but the truth, in ſo far as ſhould be demanded of him. He replied, that he would take it, with an exception to any articles that ſhould affect his own life and fortune, or tend to criminate others.—Being anſwered, that every queſtion which could be propoſed to him, muſt concern ſome of theſe articles. He took the oath, with this reſervation, that, when he found a queſtion impertinent,

* Records of Juſticiary, 25th September 1607.

1615 nent, he either would ſay nothing, or declare ſimply, that *he would not tell.* He was interrogated accordingly; but nothing material could be drawn from him: For, whatever indiſcretions eſcaped him, he reſiſted with a fortitude which does him infinite honour, every menace with which his inquiſitors endeavoured to extort from him a diſcovery of the perſons who had incurred a penalty by harbouring him. He was remanded to priſon, and loaded with heavy irons.

He was afterwards brought to Edinburgh, and examined afreſh before a new ſet of commiſſioners; but, as either his innocence, or his caution, ſcreened him from a declaration of a criminal tendency, he was threatened with the torture; and he declared his readineſs to ſuffer whatever torments they ſhould be pleaſed to inflict. But ſome perſon whom (I ſuppoſe) long practice had taught to tred with caution the paths of iniquity, adviſed, that inſtead of aſſailing the priſoner with acute torments, they ſhould keep him for ſome nights without ſleep, as being the ſureſt means, if not of ſtaggering his reſolution, at leaſt of undermining his judgment. This *happy device* was followed to ſuch an extent, that according to the priſoner's account *, he was kept from ſleep for eight days and nine whole nights, by the thruſting of needles and pins into his fleſh; which had ſuch an effect upon him, that he hardly knew what he either ſaid or did, and often could not recollect ſo much as what town he was in. He relaxed ſo far as to name ſome of the perſons who harboured him; and the commiſſioners flattered themſelves he would become ſufficiently pliable. In the mean time, upon the approach of the Chriſtmas holydays, the Archbiſhop of Glaſgow returned to his dioceſe, and took his priſoner along with him, lodged

* Relatio Incarcerationis et Martyrii P. Joannis Ogilbei, &c. &c. Duaci, typis viduae Laurentii Kellami ſub ſigno Agni Paſchalis, 1615.

lodged him in his houſe, and entertained him well *. In the 1615 beginning of January, new commiſſioners were appointed to take the priſoner's opinion on certain ſpecial interrogatories propounded by his Majeſty. To theſe he anſwered in ſubſtance, declaring, ‘ That he thought the Pope had a right of juriſdiction over the King in ſpiritual affairs; but that the priſoner was not ‘ bound to declare his opinion as to temporal, except to the ‘ Pope, or thoſe authoriſed by him: That the Pope had authority to excommunicate the King, or any perſon who had been ‘ initiated into Chriſtianity by baptiſm: That, as to the Pope's ‘ having a right to depoſe an excommunicated Prince, or to abſolve his ſubjects from their allegiance, or whether it were ‘ lawful to kill ſuch a Prince, he was not bound to declare his ‘ opinion.’—As if this declaration was not ſufficiently diſguſting to the dainty palate of the Britiſh Solomon, the priſoner volunteered in adding, that he condemned the oaths of ſupremacy and allegiance, as put in England, inſiſted that this ſhould be inſerted as part of his declaration, and ſubſcribed the whole, ‘ *Johannes Ogilveus Societatis Jeſu.*’

Nothing more was wanting to accompliſh his deſtruction. The virtuous and learned Sir Thomas More had fallen a ſacrifice *about eighty years before*, to a capricious tyrant, by ſaying, that a queſtion relating to the ſupremacy was like a two edged ſword; if one anſwered the one way, it confounded the ſoul; if the other, it deſtroyed the body. The priſoner went much further; he vehemently perſiſted in his declaration, notwithſtanding the endeavours of the King's commiſſioners to prevail on him to ſoften it; and an order from his Majeſty to the Lords of the Privy Council was received, commanding them to bring him to trial.

* Relatio Incarcerationis, &c.

1615 He was accordingly indicted upon three statutes, viz. James I. Parl. 3. chap. 48.; James VI. Parl. 8. c. 129. and Parl. 18. c. 1. But although the indictment set forth, with manifest falsehood, that the first of these acts was guarded with the pains of treason; and, although the last of them contains *the unparallelled absurdity of* '*annulling and rescinding every thing done*, *or hereafter to* '*be done*, *in prejudice of the royal prerogative*, *in any time bygone* '*or to come*;' yet neither of them could have served to condemn the prisoner, they being declaratory, but not penal acts; for, although they declared the King's power in all cases, and over all persons, they had no penal sanction whatever annexed to the breach. The statute James VI. Parl. 8. c. 129. was not so favourable for the prisoner. It confirms the royal power over all persons, and in all cases, spiritual and temporal; and declares the King and his Privy Council to be competent judges to all persons, in all matters, 'concerning which they should be apprehended, or charged to answer such things as should be inquired of them. And that none apprehended or charged to that effect should decline the authority of the King or his Council under pain of treason.' This statute, broad as it is, could not have affected the prisoner's life, had not a false construction been put upon it; by comprehending under it not only those who, when called before the King and Council, *declined their jurisdiction*, *but also those who declined to answer every impertinent or insidious question that possibly might have involved themselves in the acknowledgment of a capital crime.* This construction the King's Counsel does indeed put upon the statute, in the course of this trial. I apprehend that the words of the act, which it must be confessed, are obscure and ambiguous, do not warrant it. If they do, I have only to observe, that to oblige a person *to answer*, *under pain of death*, *to an interrogatory which*

1615

which may affect his own life, is perhaps, the greatest pitch of tyranny and iniquity that any legislative body ever attained.

The indictment proceeds to charge, that, notwithstanding these statutes, the prisoner had renounced his natural allegiance, and had endeavoured, by conferences, enticements, *mass-saying*, and other crafty means, not only to corrupt his Majesty's subjects in religion, but also to pervert them from their duty to their Prince, till he had been discovered and apprehended by the Archbishop of Glasgow.—His declaration of the 18th of January is then founded on; and many big sounding words follow, 'That the 'prisoner was guilty of *most damnable high treason*, in not an-'swering, acknowledging,' &c. &c. Towards the conclusion, the libel sets forth his Majesty's great reluctance to apply the severities of the law to the sayers and hearers of mass, and his gentleness towards such offenders, in only punishing them by imprisonment and banishment, of which the prisoner had experience in the fate of his own accomplices; but that he, *by the three last articles in his declaration*, showed a professed purpose to effect the destruction of his Majesty's person and government; by all which, he had committed heinous and unpardonable treason.

The Archbishop of Glasgow, James Marquiss of Hamilton, Robert Earl of Lothian, William Lord Sanquhar, John Lord Fleming, Robert Lord Boyd, and Sir Walter Stewart, were assessors to the Court; and Sir George Elphingstone of Blytheswood was the Chancellor of a very respectable jury. The indictment, the statutes, and the prisoner's declaration, being read over, the Advocate-depute addressed him in a speech, telling him, that he was not prosecuted for saying mass, nor for seducing the people to Popery, *nor for any thing that concerned his conscience*, but for declining

1615 declining the King's authority, and maintaining treaſonable opinions, as '*the ſtatutes libelled on made it treaſon not to anſwer the* '*King or his council in any matter which ſhould be demanded* *.'

This *conſcientious* harangue being finiſhed, the priſoner was allowed to ſtate objections, if he had any, why the perſons named ſhould not paſs upon his jury. To this he made anſwer, that 'the jurymen were either friends to his cauſe, or enemies; '*if enemies, they could not be admitted upon his trial; if friends,* '*they ſhould ſtand priſoners at the bar with him.*' This ridiculous objection being over-ruled, and the indictment, the ſtatutes, and the priſoner's ſigned declaration upon the interrogatories propounded by the King, being again read over, the priſoner, who had no counſel, was deſired to ſay what he could in his own behalf. This the unhappy man performed to a title, in a ſpeech replete with imprudence, extravagance, and bigotry, declaring, 'that he repented of nothing but not having been buſy enough 'in making converts; and *that if all the hairs in his head were* '*prieſts they ſhould all come into the kingdom.*' The Archbiſhop then addreſſed the jury; and the King's counſel finiſhed the whole, by proteſting for *an aſſize of willful error* if they ſhould acquit the priſoner.

The priſoner was ſerved with his indictment in the laſt week, and was brought to trial on the laſt day of February.—The jury being

* It is ſomewhat remarkable that the ſon or grandſon of Edmonſton of Duntreath, one of the jurymen who convicted the priſoner, was fined by the Privy Council in 9000 merks, *for refuſing to anſwer upon oath whether he had harboured one Foreſter a field preacher, who was under ſentence of baniſhment*, &c.; June 30. 1681.; Fountainhall's Deciſions, p. 145. Now, refuſing to anſwer upon oath was the only crime which was proved againſt the priſoner Ogilvie.

being inclosed, returned to the Court, which continued sitting, a speedy and unanimous verdict, finding the prisoner guilty of the whole treasons libelled He was sentenced *to be taken immediately from the Court to the place of execution, and there to be hanged and quartered.*—He then cried out, 'God have mercy upon 'me! If there be here any hidden Catholicks, let them pray for 'me; but the prayers of hereticks I will not have.' 1615

After a short interval allowed for penitence and prayer, (perhaps also for erecting the scaffold), he was hanged that same afternoon, but the quartering was dispensed with.

A few months after, William Sinclair advocate, Robert Wilkie brewer, and Robert Cruikshanks stabler in Edinburgh, were tried before the Court of Justiciary for *resetting* *, that is, giving meat and lodging to the above John Ogilvie and another Jesuit Priest. They were convicted; and by express warrant of his Majesty were sentenced to be hanged: But by a posterior warrant the sentence was changed into perpetual banishment.

Mr John Wallace for saying of Mass, being habit and repute a Popish Priest, and refusing to take the formula.

THE penal laws against Papists had amounted to a most sanguinary pitch of persecution; but, as in most cases where the punishment bears no proportion to the offence, the humanity 1722

* Records of Justiciary, July 14. August 15. & 30. 1615.

1722 ty of mankind is unwilling to furniſh the public proſecutor with evidence, ſo, in the *crime of Popery*, the ſtate had to enact a law for aſcertaining a proof of the offence. By this law it was declared, that any perſon who was *habit and repute* *, that is, generally holden and deemed to be a Popiſh Prieſt, and who ſhould refuſe to take a formula therein preſcribed, ſhould be baniſhed for life, never to return under pain of death. By the ſame law, the being found in a chapel where there were altar and maſs-book, &c. ſubjected the perſon ſo found to perpetual baniſhment. Papiſts, or thoſe refuſing to take the formula, by this ſtatute, are likewiſe declared incapable of all ſucceſſion whatever; the ſame to devolve upon the *next Proteſtant heir*. And thoſe who *apoſtatize from* ' *the true Proteſtant religion*,' by profeſſing the Popiſh, are alſo declared to forfeit their whole heritable eſtate to their next Proteſtant heir.

Upon this law Mr Wallace was indicted †. It was charged againſt him, that the magiſtrates ‡ of the Canongate, a ſuburb of Edinburgh, had *ſent a parcel of ſoldiers into the houſe of Elizabeth Ducheſs Dowager of Gordon* on the 29th of April laſt, which, by the bye, was a Sunday; that the ſoldiers there apprehended the priſoner when he was about to ſay maſs; and that he refuſed to take the formula when tendered to him. He and his ſurety had granted a bail-bond of a thouſand merks Scots to ſtand trial; but, as he failed to appear, the bail-bond was forfeited ‖, and ſentence of outlawry was pronounced againſt him.

It

* William, parliament 1ſt, ſeſſ. 8. c. 3. A. D. 1700.

† Records of Juſticiary Auguſt 23. 1722.

‡ Theſe magiſtrates were entitled to a reward of 500 merks Scots for ſeizing a Prieſt.

‖ So late as April 25. 1755, Alexander M'Donald, a Popiſh Prieſt, *by the way of favour and clemency*, was baniſhed Scotland for life, having refuſed to take the formula.

It aggravates not a little that contempt, mixed with horror, which ought to be entertained of certain parts of our penal law, that by the *unrepealed* ſtatute upon which the priſoner was condemned, no parent can put his child to an eminent maſter in riding, fencing, muſick, French, or Italian, (for ſuch are moſtly Papiſts), but he muſt incur a penalty of 500 merks for each offence, which 'may be purſued for *by any Proteſtant ſubject*, and 'upon conviction ſhall pertain to the purſuer for his reward.' What heightens the abſurdity is, that one of thoſe maſters thus forbidden by *ſtatute* to teach, has a *royal* bounty of L. 200 a year for teaching.—The trumpet of ſedition and fanaticiſm, blown by the foul breath of ignorance againſt the repeals of thoſe penal laws; the diſmal conſequences of the blaſt; the guilt which thoſe *trumpeters* incurred; and the diſgrace which they have brought upon this country, will not be purified by many *luſtrums* of liberal ſcience. I ſhall make no farther commentary upon this ſtatute, and this proſecution, but that it ſhould teach a little moderation of language to that claſs of people which upon every occaſion launches forth its undiſtinguiſhing applauſe, upon the principles of liberty which flowed from the glorious Revolution; and the principles of toleration, ſo congenial to the meek ſpirit of the Reformed Religion. 1722

Sir James Ker for celebrating clandeſtine and irregular marriage.

SIR JAMES KER in Old Roxburgh was depoſed from the office of a clergyman on account of miſbehaviour, in November 1583, and was excommunicated on the 26th of May after*. 1590

* Records of Juſticiary, June 18. 1590.

1590 He continued notwithſtanding to celebrate marriage and the ſacrament of baptiſm. For theſe offences he was tried on the 18th of June 1590, on an indictment, 'for lying under the horrible 'ſentence of excommunication, ſeparate from the ſuffrage and 'prayer of the Kirk, and merit of the blood of Chriſt, *to the* '*damnation of his ſoul, continually from the 26th day of March* '1584: That although he, for miſbehaviour, had been deprived 'of the clerical function in the month of November 1583, he 'continued notwithſtanding *to abuſe the ſacraments, by marrying* * '*ſundry perſons, and baptiſing of children.*'

The priſoner *came in the King's will, i. e.* ſubmitted to his Majeſty's pleaſure, which the King's Advocate declared to be, that the priſoner ſhould ſtand two hours at the Croſs with a paper in his hat denoting his crime; and that he ſhould not commit the like tranſgreſſion again under pain of death.—Let us compare this ſentence with that which was pronounced in the following trial, in a more enlightened age, and under a more free government.

John

† The Advocate was here a little out in his divinity. It is an apt illuſtration of the nicety of the diſpute between the Romiſh and Reformed Churches concerning the number of the ſacraments, and of the iniquity of annexing rigorous puniſhment to a difference of religious opinion, that the King's Advocate, in a criminal libel, ſhould fall into the miſtake of ſtating the celebration of irregular marriage as the abuſe of a ſacrament.

John Connochar for celebrating clandeſtine and irregular marriage.

JOHN CONNOCHAR was a nonjuring clergyman of the Epiſcopal Church of Scotland. His reſidence in a wild diſtrict of the Highlands, where there was not within many miles a man of his knowledge and learning, gave him a degree of conſequence to which his irreproachable morals and unaffected piety added ſingular importance: But his virtues were poiſoned by his attachment to an unfortunate family; and the eminence of his ſituation and character, which in better times would have commanded felicity, ſerved only to attract the fire of political vengeance. He was marked out as a victim whoſe ruin was to confound the remains of a vanquiſhed party. 1755

The gentry in the North of Scotland profeſſed almoſt univerſally the Epiſcopal or Popiſh religion; and meeting-houſes were tolerated where public worſhip was performed according to the liturgy of the Church of England. But, on the extinction of the rebellion 1745, Government thought proper to make an indirect acknowledgement of the King's title to the throne, in the moſt ſolemn addreſſes to God, an indiſpenſible part of the formula. It commanded all Epiſcopal clergymen, at every time they celebrated public worſhip * before more than five perſons, to pray for the King and royal family by name. As the gentlemen in that part of Scotland, for the moſt part, were attached to

* George II. an. 19. cap. 38.

1755 the houſe of Stuart, the act met with no other obedience than by many peoples abſenting themſelves entirely from Church. Still however many devout perſons performed a duty which they thought acceptable to God, at the riſk of incurring the vengeance of their temporal ſovereign. Various proſecutions were accordingly inſtituted for this offence; and of theſe, the moſt remarkable was that againſt the priſoner.

At the diſtance of nine years after the extinction of the rebellion, he was apprehended in his own houſe by a party of ſoldiers, on a day (30th of January) upon which it was to be expected that he and his hearers would be engaged in their forbidden worſhip *. The warrant for his commitment proceeded upon a petition from his Majeſty's Advocate to the Lords of Juſticiary, ſetting forth, that Mr Connochar without having letters of orders in terms of law, and without having taken the oaths to government, had preſumed to officiate as a miniſter, by praying and preaching, and adminiſtering the ſacraments; alſo, that his ſermons were calculated to ſow ſedition, and to excite diſaffection.

The priſoner having applied to the Lord Juſtice Clerk to be admitted to bail, his requeſt was granted: But, in the mean time, he was detained in virtue of a new warrant of the Court of Juſticiary, proceeding upon a new petition from the Lord Advocate, ſetting forth, that beſides the offences for which the priſoner was at firſt incarcerated, he was alſo to be tried on the ſtatute of Charles II. againſt celebrating clandeſtine or irregular marriage. —It muſt be obſerved, that, by the former of theſe acts, the priſoner for the firſt offence could only be ſubjected to ſix months impriſonment,

* January 30. 1755. Scots Magazine, vol. 17. p. 207.

imprisonment, but by the latter he might be condemned to perpetual banishment. 1755

A fresh bail-bond being offered, the prisoner was released on the 27th of February; and, on the 10th of April, he was brought to trial before the Circuit Court of Justiciary at Inverary: A district, where the attachments of the people, and the fate of Stewart of Aucharn, who was capitally convicted some time preceding, left no reason to dread that the jury would make any great stretch to acquit the prisoner. He was charged with two offences; the celebrating of marriage without being lawfully authorised by the established Church of Scotland, or by any other legal authority; and celebrating of it in a clandestine and disorderly way, contrary to act Charles II. Parl. Sess. 1. c. 34.

It was pled for the prisoner, that the statute libelled on * had been established directly with a view to support Episcopacy against sectaries; therefore, to turn it as an engine of destruction against that religion which it was meant to protect, was totally to invert its purpose:—That all the acts in favour of Episcopacy had been abolished by William and Mary, Parl. 1. Sess. 1. c. 5. That it behoved Episcopacy either to be the established religion or not. If it was the established religion, the Priest could not be condemned as unqualified to celebrate marriage. If it was not the established religion, it must be ranked among the sects of nonconformity; and even in that case, the clergyman was equally safe; for all laws against nonconformists were repealed by act 1690, c. 27.—This construction of the statutes was confirmed by the universal sense of the nation; for, although thousands

* Records of Western Circuit Court of Justiciary, April 10. 1755. Scots Magazine, vol. 17. p. 207.

1755 thousands of marriages had been celebrated, not only by Episcopal clergymen, but by dissenters of all sorts, no prosecution had ever been brought on this branch of the statute alone: Nay, so little was our law scrupulous as to a clergyman, the celebrator of a marriage being ordained by the established church, that a valid marriage might be pronounced by any civil magistrate: Indeed, the ceremony of marriage is totally unessential to its validity.

As to the second offence charged against him, the celebration of marriage, in a clandestine and disorderly way, it was proved on behalf of the prisoner, that the parish-church in which he lived, as well as the next parish, had been for some time vacant; so that in the district where he lived, there was no clergyman but himself, in a space of twenty miles:—That he had been scrupulously anxious to celebrate marriage in the most regular manner, both as to the *essential* and *ceremonial* parts of the contract: That when, by the want of public worship in the parish-church, the *ceremonial* part, viz. the publication of the banns, could not be performed, he made the beadle proclaim them before witnesses at the church-door; and, as to the *essential*, he instructed, that when he celebrated marriage, it was always with the consent of the friends of both parties. Nay, that he had refused to celebrate a marriage in a clandestine manner, although ten guineas had been offered as an inducement.

Notwithstanding these arguments, the Court found the first, as well as the second article of the indictment, relevant to infer the pains of law.

The counsel for the prisoner reminded the jury, that notwithstanding the interlocutor of the Court, they were entitled, if they thought

thought proper, to acquit the priſoner of both charges. But leſt the fountain of juſtice ſhould purify the ſtream of political vengeance, it was obſerved from the bench, that the jury could have no room for doubt; *and that nonjuring Epiſcopal clergymen of the priſoner's activity, were dangerous to the preſent happy eſtabliſhment.* The jury found the priſoner guilty; but, in reſpect of certain alleviating circumſtances, recommended him to mercy. —He was condemned to perpetual baniſhment, never to return under pain of death. 1755

Mr Daniel Taylor, and twenty-four other preachers of the Epiſcopal communion in Edinburgh, Mr Arthur Miller preacher in Leith, and Mr Robert Colt, and Mr James Hunter, Muſſelburgh, for preaching to an Epiſcopal congregation, without letters of orders from a Proteſtant Biſhop; and without praying for King George by name.

HIS Majeſty wrote a letter * to the Lords of Juſticiary on the 12th of May 1716, ſetting forth, that he underſtood there were meeting-houſes in Edinburgh, and other parts of Scotland, where divine ſervice was performed without praying for the King and Royal Family; and requiring their Lordſhips† 'to give ſtrict orders for ſhutting up all ſuch meeting-houſes,' and for proceeding againſt offenders in time coming. 1716

The

* The letter is ſuperſcribed 'GEORGE R.' and counterſigned by Mr Secretary Stanhope.

† Records of Juſticiary, May 18. & 21. June 11. 18. & 28. December 31. 1716; February 13. June 19. 1717.

1716 The Lords fent an anfwer to Mr Secretary Stanhope, reprefenting their alacrity in ordering profecutions againft fuch offenders; but, as to fhutting up fuch meeting-houfes, they obferved, 'We are humbly of opinion, that our forms do not allow 'fuch fummary procedure till after trial and conviction by due 'courfe of law.' Even then, their Lordfhips fufpected they were authorifed only to exact the penalties prefcribed by law; but not to fhut up the meeting-houfes. The Lords, at the fame time, ordered the Crown lawyers, with all diligence, to prepare indictments againft all Epifcopal minifters guilty of this offence.

The prifoners were accordingly ferved with an indictment, fetting forth, that a ftatute of Queen Anne was enacted for preventing difturbance to thofe of the Epifcopal communion in Scotland: That this ftatute fpecially provided, that no perfon fhould prefume to officiate as a paftor in fuch congregations, without having previoufly lodged with the juftices of peace letters of orders from a Proteftant Bifhop; and without alfo praying in exprefs words, fome time during the fervice, for '*her moft facred* '*Majefty Queen Anne, and the moft excellent Princefs Sophia,* '*Electrefs and Duchefs-Dowager of Hanover, while living* *:' That notwithftanding the demife of the late Queen, thefe claufes remained perpetual conditions; and that by an order of the Regency, Auguft 1. 1714, the clergy were required to pray in exprefs words for his moft facred 'Majefty King George:' That neverthelefs the prifoners had prefumed to celebrate the Epifcopal worfhip without letters of orders, which was contrary to the eftablifhment of the Church of Scotland, as fettled by act of parliament, and ratified by the Union; and that they had alfo neglected to pray for King George: For which tranfgreffions the prifoners ought to be punifhed in terms of the act.

Informations

* Statute 10th Anne, cap. 7.

Informations were lodged for both parties; but, as the arguments for the prisoners were over-ruled, most of them to save trouble to the Court confessed both charges. The whole of the prisoners, *except one who had produced letters of orders from an exauctorated * Scottish Bishop*, were debarred from preaching till they should produce letters of orders in terms of the act; and twenty-one of them were fined L. 20 Sterling each, half to the informer, and half to the poor of the parish; a sentence palpably illegal; for, as this penal statute annexed the penalty of L. 20 to the not praying *for Queen Anne, while living*, it was repugnant to every rule of law, to every principle of liberty, to extend the penalty to the not praying *for King George after she was dead.* As the Court had omitted to grant *letters of horning* †, his Majesty's Advocate, about six months after, prayed the Court for letters of horning, seeing *no informer would apply;* and they were granted accordingly for L. 10 against each of these persons, *to be paid to his Lordship as informer.* 1716

About the same time, a petition was presented to the Court by the magistrates of Edinburgh, setting forth, that their Lordships, by their sentence of the 28th of June, had commanded all sheriffs and magistrates of boroughs to prevent those clergymen from officiating within their districts; that however they had now produced their orders, which were registered as the statute directs; that the Lord Advocate had delivered a message to the magistrates from his royal highness the Regent, signifying his

 opinion

* An objection was stated before the magistrates of Edinburgh to the letters of orders of Mr Greenshiel's, as granted by an exauctorated Bishop. The objection was sustained by the magistrates, and afterwards by the Lords of Session; but the decree was reversed on appeal. Journal of the House of Lords, March 1. 1710.

† A form of the law of Scotland, necessary for distraining the person and goods of a debtor.

1716 opinion that they had been remiſs in executing the ſentence of Juſticiary, and his expectation that they would pay more zealous attention to carry it into execution: And the magiſtrates being at a loſs how to proceed, in reſpect of the letters of orders being produced, craved the directions of the Court. Their Lordſhips returned an anſwer to the petition of the magiſtrates, dark and equivocal as the Sybilline Oracles, importing that the proceſs was ended; that they could not alter their own ſentence; 'and 'the ſaids Lords looked on the ſaid ſentence as containing a full 'warrant for the execution of the ſame.'—I apprehend that the Lords of Juſticiary and the magiſtrates of Edinburgh had reciprocally endeavoured to devolve on each other the odium of the *people for executing* of the ſentence, or the indignation of the *Prince for not executing of it.* It appears that the ſhutting up of meeting-houſes was by no means rigorouſly enforced; for I find ſeveral of thoſe very clergymen within a few months again convicted for the ſame offence. Indeed, the criminal records, for ſome years after this, are in a manner engroſſed with proſecutions againſt Epiſcopal Nonjurors.

OF

OF WITCHCRAFT.

WITCHCRAFT first made its appearance in our criminal code, at a time when the broaching of a new set of religious notions excited a passionate desire for the attainment at extraordinary purity and strictness in doctrine and in morals. Shortly before the Reformation was established by law, an act was passed, annexing a capital punishment to the practising of sorcery *, or consulting with witches. From the words of this act, which are not a little ambiguous, there is reason to suspect that the Legislature did not believe in sorcery; and that the punishment provided by the statute was annexed not to the crime of witchcraft, but to the impiety and blasphemy of pretending to, or believing in such supernatural powers. 1588

Alison Pearson.

Alison Pearson in Byre-hills, Fifeshire †, was convicted of practising sorcery, and of invoking the Devil. She confessed that she had associated with the Queen of the Fairies for many years ‡, and that she had friends in the Court of *Elfland*, who were of her own blood. She said that William Simpson, late the King's smith, was, in the eighth year of his age, carried off by an Egyptian to Egypt, where he remained twelve years; and that this Egyptian was a giant: That the Devil appeared to her in the

 form

* Mary, Parl. 9. c. 73. A. D. 1563.

† Rec. of Just. 18th May 1588.

‡ In the original it is Queen of Elfland.

1588 form of this William Simpson, who was a great scholar, and a doctor of medicine, who cured her diseases: That he has appeared to her, accompanied with many men and women, who made merry with bag-pipes, good cheer, and wine: That the *good neighbours** attended, and prepared their charms in pans over the fire; that the herbs of which they composed their charms, were gathered before sunrise; and that with these they cured the Bishop of St Andrews of a fever and flux.—She underwent all the legal forms customary in cases of witchcraft, *i. e.* she was convicted and condemned, strangled and burned.

Janet Grant and Janet Clerk.

1590 Janet Grant and Janet Clerk † were convicted of bewitching several persons to death, of taking away the privy members from some folks, and bestowing them on others; and of raising the devil.

John Cunninghame.

It was proved against John Cunninghame, that the Devil appeared to him in white raiment ‡, and promised, that, if he would become his servant, he should never want, and should be revenged of all his enemies: That he was carried *in an ecstasy* to the kirk of North Berwick, where the Devil preached to him, and many others, bidding them not spare to do evil, but to eat, drink, and be merry; for *he should raise them all up gloriously at the Last Day:* That the Devil made him do homage, by kissing his ****. That he (the prisoner) raised the wind on the King's passage

* *Good Neighbours* was a term for witches. People were afraid to speak of them opprobriously, lest they should provoke their resentment.

† Records of Justiciary, 7th August 1590.

‡ Ibid, 26th December 1590.

passage to Denmark: That he met with Satan on the King's return from Denmark; and Satan promised to raise a mist by which his Majesty should be thrown upon the *coast of England*; and thereupon threw something like a football into the sea, which raised a vapour. 1590

Agnes Sampson.

Agnes Sampson in Keith *, a grave matron-like woman, of a rank and comprehension above the vulgar, was accused of having renounced her baptism, and of having received the devil's mark; of raising storms to prevent the Queen's coming from Denmark; of being at the *famous meeting* at North Berwick, where six men, and ninety women, witches, were present, dancing to one of their number, who played to them on a Jew's-harp. It was charged in the indictment, that the Devil was present at this meeting; and started up in the pulpit, which was hung round with black candles: That he called them all by their names, asked them, If they had kept their promises, and been good servants, and what they had done since the last meeting: That they opened up three graves, and cut off the joints from the dead bodies fingers, *and that the prisoner got for her share two joints and a winding sheet, to make powder of to do mischief*: That the Devil was dressed in a black gown and hat; and that he ordered them to keep his commandments, which were to do all the ill they could, and to kiss his ****.

Euphan

* Rec. of Just. Jan. 27. 1590. A story is told of this woman in Spottiswood's Hist. p. 383. which is nowise confirmed by the record. His fable is absurd; and seems to have been invented by some zealous believer in the *divine right of Kings*.

Euphan M'Calzeane.

1591 Euphan M'Calzeane was a lady poſſeſſed of a conſiderable eſtate in her own right. She was the daughter of Thomas M'Calzeane Lord Cliftonhall, one of the Senators of the College of Juſtice, whoſe death in the year 1581, ſpared him the diſgrace and miſery of ſeeing his daughter fall by the hands of the executioner. She was married to a gentleman of her own name, by whom ſhe had three children. She was accuſed of treaſonably conſpiring the King's death by enchantments *; particularly by framing a waxen picture of the King; of raiſing ſtorms to hinder his return from Denmark; and of various other articles of witchcraft. She was heard by counſel in her defence; was found guilty by the jury, which conſiſted of landed gentlemen of note; and her puniſhment was ſtill ſeverer than that commonly inflicted on the Weyward Siſters,—She was *burned alive*, and her eſtate confiſcated. Her children, however, after being thus barbarouſly robbed of their mother, were † reſtored by act of Parliament againſt the forfeiture. The act does not ſay that the ſentence was unjuſt; but that the King was *touched in honour and conſcience* to reſtore the children. But *to move the wheels of his Majeſty's conſcience*, the children had *to greaſe them*, by a payment of five thouſand merks to the *donator of eſcheat* ‡, and by relinquiſhing the eſtate of Clifton-hall, which the King gave to Sir James Sandilands of Slamanno.

As

* Rec. of Juſt. 8th May 1591. † Unprinted Acts, A. D. 1592. No. 70.
‡ He who obtains a gift of the forfeiture.

As a ſtriking picture of the ſtate of juſtice, humanity, and ſcience in thoſe times *, it may be remarked, that this Sir James Sandilands, *a favourite of the King's*, (' *ex interiore principis* ' *familiaritate*,') who got this eſtate, which the daughter of one Lord of Seſſion forfeited, on account of being a witch, did that very year murder another Lord of Seſſion in the ſuburbs of Edinburgh, in the public ſtreet, without undergoing either trial or puniſhment. 1591

Patrick Lawrie.

Among many acts of witchcraft for which Patrick Lawrie was committed to the flames, there were his conſulting with, and receiving from the Devil a hand belt †; in one end of which '*appeared the ſimilitude of four fingers and a thumb, not far different from the claws of the Devil;*'—His bewitching Beſſie Sands's corns, and taking the whole ſtrength and ſubſtance out of them for ten years ſucceſſively;—His enchanting certain milk-cows, which thereby, inſtead of milk, yielded nothing but blood and matter;—And his *curing* Elizabeth Crawfurd's child, which, for eight or nine years, had been afflicted with an *incurable diſeaſe*. 1605

Margaret Wallace.

Margaret Wallace ‡ was tried before the Court of Juſticiary. The Duke of Lennox, the Archbiſhop of Glaſgow, and Sir George Erſkine of Innerteil, ſat as aſſeſſors to the judges, and an eminent counſel was heard in behalf of the priſoner. She was accuſed of inflicting and of curing diſeaſes by inchantment; but it 1620

* *Johnſtoni Hiſtoria Rerum Britannicarum*, p. 172. See alſo p. 155. of this work. † Records of Juſticiary, July 23. 1605. ‡ Records of Juſticiary, March 20. 1620.

1620 it was not ſpecified what ſpells ſhe employed. It was *libelled* againſt her, that on being taken ſuddenly ill ſhe ſent for one Chriſtian Graham, a notorious witch, who afterwards ſuffered a capital puniſhment, and that this witch transferred the diſeaſe from the priſoner to a young girl: That the girl being thus taken ill, her mother was adviſed by the priſoner to ſend for Chriſtian Graham, who anſwered, that her confidence was in God, and ſhe would have nothing to do with the Devil or his inſtruments: The priſoner replied, *that in a caſe of this ſort Chriſtian Graham could do as much as God himſelf; and that without her aid there was no remedy for the child:* But the mother not conſenting, the priſoner without her knowledge ſent for Chriſtian, who muttered words, and expreſſed ſigns, by which ſhe reſtored the child to health, &c. Her counſel urged, that the indictment was by much too general: That it ought to have been ſpecified, not ſimply that ſhe did enchant, but alſo by what kind of ſpells ſhe performed her incantations: That ſuppoſing Chriſtian Graham to have been a witch, and that the priſoner when taken ill conſulted her, ſtill he was entitled to plead that the priſoner conſulted her on account of her medical knowledge, and not for her ſkill in ſorcery: That as to the blaſphemous expreſſions, however well they might found a trial for blaſphemy, they by no means inferred the crime of witchcraft; and he quoted many authorities from the Civil and Canon laws. He farther challenged one of the aſſizers, becauſe one of the articles charged againſt the priſoner was her having done an injury to his brother-in-law.—The whole defences were repelled by the judges; and the jury found the priſoner guilty.

Iſobel

Iſobel Young.

Iſobel Young in Eaſt Barns * was accuſed of having ſtopped by enchantment George Sandie's mill *twenty-nine years before*; of having prevented his boat from catching fiſh while all the other boats at the *herring-drave*, or herring fiſhery, were ſucceſsful; and that ſhe was the cauſe of his failing in his circumſtances, and of nothing proſpering with him in the world: That ſhe threatened miſchief againſt one Kerſe, who thereupon loſt the power of his leg and arm: That ſhe entertained ſeveral witches in her houſe, one of whom went out at the roof in likeneſs of a cat, and then reſumed her own ſhape: That ſhe *took a diſeaſe off her huſband, laid it under the barn floor, and transferred it to his nephew, who when he came into the barn ſaw the firlot hopping up and down the floor*: That ſhe uſed the following charm to preſerve herſelf and her cattle from an infectious diſtemper, viz. to bury a white ox and a cat alive, throwing in a quantity of ſalt along with them: That ſhe had *the Devil's mark*, &c. 1629

Y y Mr

* Records of Juſticiary, February 4. 1629. In this trial mention is made of the proprietor of the cattle having applied to Lockhart of Lee for the uſe of his *curing ſtane* to cure the cattle, and that he graciouſly condeſcended to give them ſome water in which it had been dipped; and the water having (I ſuppoſe) derived virtue *from the ſtone*, as the Pool of Bethſeyda *from the angel*, the cattle were thought to be a good deal the better.—This famous inſtrument of ſuperſtition has maintained its reputation for many centuries. It is ſaid to have been brought home by Lockhart of Lee, who accompanied the Earl of Douglas in carrying King Robert the Bruce's heart to the Holy Land. It is called the *Lee Penny*. Beſides its curing of cattle, it has another virtue, that *it can never be loſt*. It is ſtill in the poſſeſſion of that ancient family; and people from various parts of Scotland, and even of England, whoſe cattle were infected, have made application within theſe few years for water in which *the ſtane* had been dipped.

1629 Mr Laurence Macgill and Mr David Primrofe appeared as counfel for the prifoner. They pleaded, that the mill might have ftopped, the boat catched no fifh, and the man not profpered in the world, from—*natural caufes;* and it was not *libelled* by what fpells fhe had accomplifhed them: That as to the man who had loft the power of his leg and arm, *firft*, fhe never had the leaft acquaintance with him; *fecondly*, fhe offered to prove that he was lame previous to the threatening expreffions which fhe was faid to have ufed: That the charge of *laying a difeafe under a barn floor* was a ridiculous fable, taken probably from a fimilar ftory in Ariofto; and that two years had elapfed between her hufband's illnefs and his nephew's: That what the profecutor called *the Devil's mark*, was nothing elfe than the fcar of an old ulcer; and that the charge of her burying the white ox and the cat was falfe.

The celebrated Sir Thomas Hope, who was counfel for the profecution, replied, that thefe defences ought to be repelled, and no proof allowed of them, becaufe *contrary to the libel;* that is to fay, in other words, *becaufe what was urged by the prifoner in her defences contradicted what was charged by the public profecutor in his indictment.*—The defences for the prifoner were overruled.—Is it needful for me to add that fhe was convicted, ftrangled, and burned?

This moft incredibly abfurd and iniquitous doctrine, of repelling defences becaufe contrary to the libel; this fyftem of *legal murder*, was till the prefent century a received maxim of criminal jurifprudence in Scotland. Thus, befides in the prefent, and fundry other trials for witchcraft, when John Young was accufed of the murder of Archibald Reid, by a wound with a hanger

hanger on the *shakle-bone*, *i. e.* the wrist, given *about four or five months preceding his death*, he pleaded, that the wrist was not one of the noble parts where a mortal wound could be inflicted :— That the indictment set forth the wound to have been given about four or five months preceding the death of the deceased; and it was an established maxim of law, that if a person survived a wound forty days, his death must be imputed to some other cause: —That the deceased had a complete reconvalescence, wrought at his usual trade of a smith, reaped his own corn, and gathered it in. The counsel for the prosecution insisted that these defences should be repelled, *in respect of dittay*, (*i. e.* as being contrary to the libel), and the Court over-ruled them *.—When a person of the name of Mowat was prosecuted for mutilation by two gentlemen of the name of Cheyne, he pleaded that the wounds he gave were in self-defence. Sir Thomas Hope, Lord Advocate, who in the course of that month was appointed Lord Justice General for life, opposed the defence, and insisted it should be repelled, *as being contrary to the libel.* To exclude the prisoner from the benefit of his *exculpatory* evidence, he added another argument equally founded in good sense and equity, 'that the pursuer's witnesses were examined upon all pro- 'per interrogatories offered by the prisoner, *therefore there* '*was no necessity for his leading other witnesses.*' The Court repelled the prisoner's defence, and refused to allow him *to adduce witnesses* to prove the fact †.—When Mr William Somerville was tried for the murder of Elisabeth Renton, he offered in his defence to prove that the wound given the deceased ‡ was not mortal; that she walked on the night she was wounded to her brother's house, three miles distant; that she did not take her bed, but continued to work as a servant in her usual employments for three months. At last, having gone to attend in his illness her 1629

* Rec. of Just. July 30. 1630.

† Rec. of Just. July 15. 1642.

‡ M'Kenzie's Criminals, tit. 22. sect. 2.

1629 brother who died of a ſpotted fever, ſhe caught the infection, and died of that diſeaſe.—Theſe defences however were over-ruled, were not admitted to proof, becauſe contrary to the indictment, wherein it was expreſsly libelled that he gave her a mortal wound.

When William Mackie was tried for killing James Murray in a duel, he pleaded it was in ſelf-defence, for Murray had aſſaulted him with a drawn ſword: To which it was replied, that the defence could not be ſuſtained, becauſe the libel expreſsly charged that they fought in conſequence of previous mutual provocation, and the defence was over-ruled.—According to the ſame doctrine, the defence of *alibi* muſt have been rejected by this dreadful tribunal *.

Alexander Hamilton.

1630 Alexander Hamilton (if we may truſt his judicial confeſſion,) met the Devil in the likeneſs of a black man riding on a black horſe †. Hamilton renounced his baptiſm, and engaged to become the Devil's ſervant, from whom he received four ſhillings Sterling. When he wanted an audience of his Infernal Majeſty, he was inſtructed to beat the ground thrice with a fir-ſtick, and ſay, '*Riſe up Foul Thief*,' and accordingly the Devil uſed to obey the ſummons, and appeared in the ſhape of a raven, a cat, or a dog, and gave reſponſes.—The Devil inſtructed him how to be revenged of his enemies; alſo how to cure and transfer diſeaſes; and further, gave him a ſpell, by which he killed the Lady Ormeſtone

* See the perplexity with which Sir George Mackenzie expreſſes himſelf upon the head of *alibi*. Mackenzie's Criminal Trials, tit. 22. ſect. 3.

† Records of Juſticiary, January 22. 1630.

ſtone and her daughter, in revenge of the Lady's having refuſed him the loan of a mare, and having called him nicknames. *Laſtly*, He declared, that he had many meetings with the Devil, *from whom he once got a ſevere drubbing for not keeping an appointment.* 1630

John Neil.

John Neil was charged with taking off and laying on diſeaſes, the former of which he ſometimes effected by making the ſick perſons ſhirt be waſhed in a ſouth-running water.—With giving reſponſes concerning the time and manner of people's death.—With holding conſultation with the Devil *, and Witches, on Coldinghim Law, how to compaſs the death of Sir George Home of Manderſton. That the reſult of their deliberation was the getting *an enchanted dead foal* and putting it in Sir George's ſtable, under his ſtoned-horſes manger; alſo *a dead hand enchanted by the Devil*, which they put in Sir George's garden; and that by theſe means he contracted a grievous diſeaſe, of which he could not be recovered, till the dead foal and dead hand were diſcovered and burned. No pleading, no depoſition of witneſſes, no confeſſion of the priſoner is recorded; but the jury found the uſual verdict, and the uſual ſentence was pronounced by the Court. 1631

Janet Brown, and others.

An act and commiſſion of parliament was paſſed on the 12th of July, and another on the 7th of Auguſt 1649, conſtituting Sir James Melville of Raith, Alexander Orrock of Orrock, Robert Aytoun of Inchdarnie, and certain bailies of Burntiſland, judges, with 1649

* Rec. of Juſt. March 26. 1631.

1649 with powers to try certain perſons for the crime of witchcraft. —Janet Brown was firſt brought before them. She was charged in the indictment with having held ' a meeting with the Devil ' appearing as a man, at the back of Broomhills, who was *at a ' wanton play* with Iſobel Gairdner elder, and Janet Thomſon ; ' and he vaniſhed away like a whirlwind *.'—With having there renounced her baptiſm, upon which the Devil *ſealed her as one of his*, by a mark on the right arm, into which *Mr James Wilſon miniſter of Dyſart, in preſence of Mr John Chalmers † miniſter at Auchterderran, thurſt a long pin of wire into the head, and ſhe was inſenſible of it.* And the like experiment was tried in preſence of Mr James Dalglieſh miniſter at Cramond, &c.—The priſoner, and two other women, were convicted, condemned, and executed, in one day.

Within a few days after, other three miſerable women arrived at the laſt ſtage of a common journey in thoſe days of ſuperſtitious ignorance ‡, viz. from the parſon of the pariſh to the criminal judges, and from the criminal judges to the executioner. They were arraigned before the ſame tribunal, on the hacknied charge of meeting with the Devil. One of them, Iſobel Bairdie, was accuſed of having taken up a *ſtoup*, i. e. a flaggon, and drank, ' and the devil drank to her, and ſhe pledging him, ' drank back again to him, and he pledged her, ſaying, *Gram- ' mercie, you are very welcome.*'—In each of the three indictments, it is added, that the priſoner had confeſſed, in preſence of ſeveral miniſters, bailies, and elders. And it appears from the

* Original MSS. in poſſeſſion of Major Melville of Murdochcairnie.

† Two of theſe reverend inquiſitors, Wilſon and Dalglieſh, were turned out of their churches, A. D. 1663, for not ſubmitting to the act of parliament re-eſtabliſhing Prelacy.

‡ Wodrow's Hiſtory of the Sufferings of the Church, vol. 1. Appendix, No. 37.

the verdict of the jury, that these inquisitors were produced before the court, to prove the *extrajudicial confessions* of the miserable prisoners, who had already been harrassed, perhaps out of their senses, or rendered weary of life, by the persecutions of brutish ignorance, and diabolical cruelty. 1649

The jury found the prisoners 'guilty of the said crime of 'witchcraft, and that they deserve to die therefor: *But referring 'the manner of their death, and time and place of their execution 'to the said judges their determination* *.' The judges ordained them to be taken that same afternoon to the place of execution, at the   and there to be strangled at a stake and burned.

Major Weir.

The noted Major Weir, who was accused of having exceeded the common depravity of mankind, was dreaded for his sorceries, and admired for his *gift* of prayer. He *confessed crimes that it was possible for him to have committed*, as well as the absurd imputation of witchcraft. Yet he qualified his confession by answering to the articles of the indictment, '*that he thought himself 'guilty of the foresaid crimes, and could not deny them* †.' The Lord Advocate then led a distinct proof of his extrajudicial confession, which was marked with circumstances that convice me he was in many respects acknowledging the truth. Indeed his sister swears to his guilt in one of the articles *libelled*.—I must observe, at the same time, that one of the witnesses to his confession was the 1670

* In these trials mention is made of several wizards and witches who had lately suffered at Aberdour.

† Rec. of Just. April 9. 1670.

1670 the minister of Ormestone, who swore that the Major had sent for the witness to prison, *in order to confess his sins to him, which confession the minister gave in evidence* * *against him when tried for his life*: And that I am convinced of the prisoner's having been delirious at the time of his trial. I decline publishing the particulars of this case †.

Isobel Elliot and nine other women.

1678 Isobel Elliot and nine other women were tried for witchcraft in one day. The articles of indictment against all of them were pretty much the same. Those exhibited against Isobel Elliot were as follow ‡: That about two years ago she staid at home from *the kirk* at the desire of her mistress, who was a witch, when the Devil had a meeting with the prisoner, her mistress, and two other witches; that he kissed the prisoner, baptised her on the face *with an waff of his hand like a dewing*, and offered to lie with her, but forbore because she was with child; that after she was *kirked* the Devil often met her, and had *carnal copulation*

* In countries where the Roman Catholick religion is professed, the priest who betrays what is communicated to him in confession is (I am told) burned alive. When the Reformed clergy renounced the *errors of Popery*, they were too wise to reject, *in practice*, so powerful an instrument in the hands of the priesthood, as auricular confession. I leave it to casuists in religion to determine as to the efficacy of auricular confession in the *salvation of the soul*; but I cannot help thinking, that for a priest to reveal this confession in a criminal court, to the *destruction of the body*, deserves to be placed nigh the top of the scale of human depravity.

† So great was the horror entertained for Major Weir, so general was the belief that his house was possessed by Devils, that almost for a hundred years no person would inhabit it. At this minute it is not occupied as a dwelling-house, but as a smith and woolcomber's shops.

‡ Rec. of Just. Sept. 13. 1678.

lation with her. The prisoner and the other nine miserable women underwent all the legal forms incident to their unhappy situation among that deluded and barbarous people. They had been prosecuted by his Majesty's Advocate; they judicially acknowledged their guilt, were convicted by the jury, condemned by the judges, and burned by the executioner,—*for having had carnal copulation with the Devil.* 1678

Impostor of Bargarran.

Some years after, an impostor appeared, in the character of a person tormented by witches, Christian Shaw, daughter of John Shaw of Bargarran, a gentleman of some note in the county of Renfrew. She is said to have been but eleven years of age. And although it is probable that hysterical affections may in part have occasioned her rhapsodies to proceed from real illusion, as well as accounted for the contortions which agitated her body; yet she seems to have displayed an artifice above her years, an address superior to her situation, and to have been aided by accomplices, which dulness of apprehension, or violence of prejudice, forbade the bystanders to discover. 1697

This actress was abundantly pert and lively; and her challenging one of the house-maids for drinking, perhaps for stealing, a little milk, which drew on her an angry retort, was the simple prelude to a complicated and wonderful scene of artifice and delusion, of fanaticism and barbarity.

1697 In the month of Auguſt 1696 *, within a few days after her quarrel with the houſe-maid, the girl was ſeized with hyſterical convulſions, which in repeated fits diſplayed that variety of ſymptoms which characteriſe this capricious diſeaſe. To theſe, other appearances were ſpeedily added, which could only be attributed to ſupernatural influence, or to fraud and impoſition. She put out of her mouth quantities of egg-ſhells, orange-pill, feathers of wild, and bones of tame fowl, hair of various colours, hot coal-cinders, ſtraws, crooked pins, &c.

Having by thoſe ſenſible objects impreſſed the publick with the moſt complete and fearful conviction of her being 'grie-'vouſly vexed † with a Devil,' ſhe found herſelf capable to command the implicit aſſent of the ſpectators, in matters that were repugnant to the evidence of their own ſenſes. For this purpoſe, ſhe fell upon the device of ſeeming to poſſeſs the faculties of ſeeing and hearing, in a manner oppoſite to that of the reſt of mankind. She would addreſs ſome inviſible beings as if actually preſent; at other times, in her converſations with thoſe inviſible beings, ſhe would rail at them for telling her that perſons actually preſent were in the room; proteſting that ſhe did not ſee them, yet at the ſame time minutely deſcribing their dreſs. For inſtance, ſhe ſpake as follows to the chief of her alledged tormentors, Catherine Campbell, with whom ſhe had the quarrel, and who, to uſe the language of thoſe times, was not *diſcernibly* preſent: 'Thou ſitteſt with a ſtick in thy 'hand to put into my mouth, but thorough God's ſtrength thou 'ſhalt not get leave: Thou art permitted to torment me, but I 'truſt in God thou ſhalt never get my life. I'll let thee ſee, *Kat-'tie*, there is no repentance in hell. O what ailed thee to be a 'witch! Thou ſayeſt it is but three nights ſince thou waſt a 'witch.

* True narrative of the ſufferings and relief of a young girl. Edinburgh, printed by James Watſon, 1698.

† St Matthew, c. 15. v. 22.

'witch. O, if thou would'ſt repent, it may be God might give 1697
'thee repentance, if thou would'ſt ſeek it, and *confeſs*; if thou 'would deſire me, I would do what I could; for the Devil is an 'ill maſter to ſerve,' &c. &c. After that, ſhe took up her Bible, read paſſages, and expounded them; and, upon one's offering to take it from her, ſhe ſhreiked horribly, exclaiming, 'She would keep her Bible in ſpite of all the Devils in hell!' Then ſhe fought, and kicked, and writhed herſelf, as if ſtruggling with ſome inviſible tormentor. When the ſheriff-depute of the county, accompanied by a macer of Juſticiary, came to apprehend ſome of the perſons whom her diabolical malice had accuſed, and were actually in her preſence, ſhe addreſſed an imaginary and inviſible correſpondent thus: 'Is the ſheriff come? 'Is he near me?' (Then ſtretching forth her hand, as if to grope, and the ſheriff putting his hand into her's, ſhe proceeded:) '*I cannot feel the ſheriff.* How can he be preſent here? 'or how can I have him by the hand, as thou ſayeſt, ſeeing I 'feel it not? Thou ſayeſt he has brown coloured cloaths, red 'pluſh breeches, with black ſtripes, flowered muſlin cravat, and 'an embroidered ſword-belt: Thou ſayeſt there is an old gray 'haired man with him, having a ring upon his hand; but I can 'neither ſee nor feel any of them. What, *are they come to ap-'prehend the gentlewoman?* Is this their errand indeed?'

Theſe reiterated and aweful exerciſes of the dominion of Satan (for ſuch they were univerſally deemed,) impreſſed all ranks with amazement and terror. The clergy, as was their duty, were the foremoſt to embrace the cauſe of a diſciple that was engaged *in more than ſpiritual* warfare with the grand enemy. Clergymen, by rotation, attended the afflicted damſel, to aſſiſt the miniſter of the pariſh, the family of Bargarran, and other pious Chriſtians, in the expiatory offices of faſting and prayer. A publick

1697 faſt was ordained by authority of the preſbytery. Three popular clergymen ſucceſſively harangued the trembling audience; and one of them choſe for his theme this awful text, 'Woe to the inhabitants of the earth and of the ſea, for the Devil is come down unto you, having great wrath, becauſe he knoweth that he hath but a ſhort time. *And when the dragon ſaw that he was caſt down unto the earth, he perſecuted the woman* *.'—And the prayers and exhortations of the church were ſpeedily ſeconded with the weight of the ſecular arm.

On the 19th of January, a warrant of Privy Council was iſſued †, which ſet forth, that there were pregnant grounds of ſuſpicion of witchcraft in the ſhire of Renfrew, eſpecially from the afflicted and extraordinary condition of Chriſtian Shaw, daughter of John Shaw of Bargarran. It therefore granted commiſſion to Alexander Lord Blantyre, Sir John Maxwell of Pollock, Sir John Shaw of Greenock, William Cunnyngham of Craigens, Alexander Porterfield of Duchall, ——— Caldwall of Glanderſtoun, Gavin Cochrane of Thornlymuir, Alexander Porterfield of Fullwood, and Robert Semple ſheriff-depute of Renfrew, or any five of them, to interrogate and impriſon perſons ſuſpected of witchcraft, to examine witneſſes, &c. but not upon oath, and to tranſmit their report before the 10th of March. The act of Privy Council is ſubſcribed thus, 'Polwarth *Cancellar.* Argyle, Leven, Forfar, Raith, Belhaven, Ja. Steuart, J. Hope, W. Anſtruther, J. Maxwell, Ro. Sinclair.'

In the report which was preſented on the 9th of March, the commiſſioners repreſented that there were *twent-four perſons male*

* Revelations, chap. 12.

† Records of Privy Council, January 19. March 9. April 5. 1697.

male and female suspected and accused of witchcraft, and that further inquiry ought to be made into this crime. Among these unhappy objects of suspicion, it is to be remarked, that there was *a girl of fourteen, and a boy not twelve years of age*. Agreeable to this report, a new warrant was issued by the Privy Council to most of the commissioners formerly named, with the addition of Lord Hallcraig, Mr Francis Montgomery of Giffin, Sir John Houston of that Ilk, Mr John Kincaid of Corsbasket, Advocate, and Mr John Stewart younger of Blinkhall, Advocate, or any five of them, to meet at Renfrew, Paisley, or Glasgow, to take trial of, *judge, and do justice* upon the foresaid persons; and to sentence the guilty *to be burned or otherwise executed to death*, as the commissioners should incline. It further ordained the commissioners to transmit to the Court of Justiciary an authentick extract of their proceedings, to be entered upon its records; and contained a recommendation to the Lords of the Treasury to defray the expences of the trial. The act is subscribed, 'Polwarth 'Cancellar. Douglass, Lauderdale, Annandale, Yester, Kintore, 'Carmichael, W. Anstruther, Arch. Mure.' 1697

The commissioners, thus empowered, were not remiss in acting under the authority delegated to them. After twenty hours were spent in the examination of witnesses, who *gave testimony* that the *malefices* * libelled could not have proceeded from natural causes, and that the prisoners were the authors of these malefices.—After five of the unhappy prisoners confessed their own guilt, and criminated their alledged associates—after counsel had been heard on both sides, and the counsel for the prosecution had declared, that 'he would not press the jury with the *ordinary se-'verity* of threatening an *assize of error* †:' But recommended to them

* *Malefice* in the Scots law signifies an act or effect of witchcraft.

† This was an oblique and most scandalous menace. *Assizes of Error* were declared a grievance by the Estates of Parliament at the Revolution.

1697 them to proceed according to the evidence ; and loudly declared to them, that although they ought to beware of condemning the innocent, yet if they ſhould acquit the priſoners, in oppoſition to legal evidence, '*they would be acceſſory to all the blaſphemies, a-*'*poſtacies, murders, tortures, and ſeductions, whereof theſe enemies* '*of heaven and earth ſhould hereafter be guilty*.' After the jury had ſpent ſix hours in deliberation, ſeven of thoſe miſerable perſons were condemned to the flames *.

Theſe inſtances afford a ſufficient ſpecimen of the mode of proſecution againſt the multitude of miſerable perſons who were ſacrificed at the altar of the Fatal Siſters,—Ignorance,—Superſtition,—and Cruelty. But it is impoſſible to form an eſtimate of the number of the victims. For not only the Lords of Juſticiary, but bailies of regalities, ſheriffs of counties, and the endleſs tribe of commiſſioners appointed by the Privy Council †, and ſometimes by Parliament, officiated as the Prieſts who dragged the victims to the altar.

The time however faſt approached, when theſe human ſacrifices were to be aboliſhed. The laſt perſon who was proſecuted before the Lords of Juſticiary for witchcraft was *Elſpeth Rule*, who was tried before Lord Anſtruther at the Dumfries circuit, on the 3d of May 1709 ‡. No ſpecial act of witchcraft was charged againſt her ; the indictment was of a very general nature, that

* The order of Privy Council for recording the Commiſſioners proceedings in the books of Juſticiary was not complied with. I am therefore unable to give any further particulars of the cataſtrophe of theſe miſerable perſons, or of the criminal abſurdity of thoſe who committed them to the flames.

† For ſome time after the reſtoration, the records of Privy Council are in a manner engroſſed with commiſſions to take trial of witches. There is an inſtance of the Council, at one ſederunt, granting *fourteen ſeparate commiſſions to take trial of witches*. Records of Privy Council, November 7. 1661. January 23. 1662.

‡ Records of Circuit Court of Juſticiary, holden at Dumfries, May 3. 1709.

that the prisoner was *habit and repute* * (that is, generally holden and deemed) a witch; and that she had used threatening expressions against persons at enmity with her, who were afterwards visited with the loss of cattle, or the death of friends, and one of whom run mad—The jury, by a majority of voices, found these articles proved, and the Judge ordained the prisoner to be burned on the cheek, and to be banished Scotland for life.—The last person who was brought to the stake in Scotland for the crime of witchcraft was condemned by Captain David Ross of Little Daan † sheriff-depute of Sutherland, A. D. 1722. 1709

Besides in the sufferings, and tragical end of the persons already specified, human ingenuity seems to have been exhausted in devising variety of torment, against other persons who lay under the suspicion of witchcraft, and who persisted with astonishing fortitude, in denying the absurd imputation, even when urged with the sharpest tortures.

From the universal and excessive abhorrence entertained at a witch, a suspicion of that crime, independent of judicial severities,

* *Habit and repute* is a very dangerous doctrine of the law of Scotland, at this minute in full force, by which a man may be hanged altho' hardly any charge be exhibited against him, but that he has a bad character.—For instance, if a man is charged with stealing a pair of old shoes, value threepence, and with being *habit and repute* a thief, if the jury find such indictment proved, or such prisoner guilty, the Court would by law be bound to sentence the prisoner to be hanged;—if my temerity may be pardoned, for supposing that any such thing exists as a precise established rule of criminal law in Scotland.

† It is no small disappointment to me that I cannot lay this trial before the reader. The Sheriff Court books of the county of Sutherland were carried off by the Sheriff Clerk about fifty years ago. I am somewhat however consoled for my disappointment, by the politeness shown me by James Traill, Esq; of Hobbister, Advocate, Sheriff-depute of Caithness and Sutherland, who was so obliging as to make a laborious but ineffectual search to recover the books.

1709 ties *, was ſufficient to render the unhappy object anxious for death.—Thruſting of pins into the fleſh, and keeping the accuſed from ſleep, were the *ordinary* treatment of a witch. But if the priſoner was endued with uncommon fortitude, other methods were uſed to extort confeſſion. *The boots*, *the caſpie-claws*, *and the pilniewinks*, engines for torturing the legs, the arms, and the fingers, were applied to either ſex; and that with ſuch violence, that ſometimes the blood would have ſpouted from the limbs. Loading with heavy irons, and whipping with cords, till the ſkin and fleſh were torn from the bones, have alſo been the adopted methods of torment.

The bloody zeal of thoſe inquiſitors attained to a refinement in cruelty ſo ſhocking to humanity †, and ſo repugnant to juſtice, as to be almoſt incredible. Not ſatisfied with torturing *the perſon* of the accuſed, their ingenious malice aſſailed the more delicate feelings, and ardent affections of *the mind*. An aged huſband, an infant daughter, would have been tortured in preſence of the accuſed, in order to ſubdue her reſolution.—Nay, death itſelf ‡ did not ſcreen the remains of thoſe miſerable perſons from the malice of their proſecutors. If an unfortunate woman, trembling at a citation for witchcraft, ended her ſufferings by her own

* Mackenzie's Criminal Trials, tit. *Witchcraft*.

† Records of Juſticiary, June 4. 1596. When Aliſon Balfour was accuſed of witchcraft, ſhe was put in the caſpie-claws, where ſhe was kept forty-eight hours; her huſband was put in heavy irons, *her ſon put in the boots, where he ſuffered fifty-ſeven ſtrokes*, and her little daughter, of about ſeven years of age, put in the pilniewinks, in her preſence, in order to make her confeſs.—She did confeſs.—She retracted her confeſſion in the courſe of the trial; and publickly, at her execution, declared that the confeſſion was extorted from her by the torments.—The mode of tormenting and executing thoſe miſerable women is further illuſtrated by the authentic accompt of the expence of burning a witch at Burncaſtle, near Lauder, A. D. 1649, an original paper, publiſhed in Appendix, No. 6.

‡ Fountainhall's Deciſions, vol. 1. p. 60. October 9. 1679.

own hands, ſhe was dragged from her houſe at a horſe's tail, and buried under the gallows. 1709

Locke had written upon government, Fletcher had been a patriot ſtateſman, Bolingbroke had been a Miniſter in the Auguſtan age of Queen Anne, ere this ſyſtem of legal murder and torture was aboliſhed.—This was an honour which the tardy humanity of their countrymen reſerved, *almoſt to the middle of the preſent century* *, *for Mr CONDUIT, ALDERMAN HEATHCOTE, and Mr CROSSE.* Theſe gentlemen brought a bill into the Houſe of Commons, which was paſſed into a law, repealing the former ſtatutes againſt witchcraft, Scots as well as Engliſh, and diſcharging proſecutions for that crime, or for accuſing others of that offence †.—On the enactment of this ſtatute vaniſhed all thoſe imaginary powers, ſo abſurdly attributed to women oppreſſed with age and poverty.

While we reflect upon the blind and barbarous ſuperſtition of our anceſtors, while we beſtow the tribute of applauſe on thoſe humane and liberal ſenators who introduced this law, we cannot help lamenting that a ſect among us looks upon the abolition of the penal ſtatutes againſt witchcraft, not only as an evil, but a ſin.——The *Seceders* publiſhed an act of their aſſociate preſbytery at Edinburgh, A. D. 1743. This act, which is full of the moſt illiberal and abſurd doctrines, the moſt ſeditious and intolerant ſpirit, was reprinted at Glaſgow ſo late as the year

 1766.

* Till A. D. 1735.

† Journals of the Houſe of Commons, Jan. 22. 1735. Geo. II. an. 9no, c. 5to.

1709 1766. In it there is contained *the annual confeſſion of ſins*, which to this day they read from the pulpit.—Among the ſins *national and perſonal* there confeſſed, are the act of Queen Anne's parliament for tolerating the Epiſcopal religion in Scotland, the act for adjourning the Court of Seſſion during the Chriſtmas holydays; '*as alſo the penal ſtatutes againſt witches have been repealed by* '*parliament, contrary to the expreſs law of God* *.'—The *Seceders* comprehend a very large body of the populace in Scotland. Their zeal for the renewal of the Covenant, their tolerant ſpirit, are either not attended to by thoſe who have been exerting their endeavours to arm our populace; *or thoſe advocates for a militia* little know to what important and dangerous purpoſes religious zeal may be applied.

It is well deſerving of remark, that the ſame ſect which is railing at patronages, and preaching up the renewal *of the Solemn League and Covenant*, ſhould diſplay the moſt rancorous ſpirit of oppoſition, to the repeal of the penal laws *againſt Popery and againſt witchcraft*.

Theſe

* Act for renewing the Covenants, p. 26. 27. 34.

* * * * *

Theſe pages, while they ſtate facts deeply intereſting, they at the ſame time give a melancholy diſplay of human nature: If they preſent us with the *outrageous crimes of the priſoners*, they alſo exhibit what is much more ſhocking, the *legal murders of the Court*.—Let us inquire whence proceeded a ſyſtem of penal law, ſo repugnant to juſtice, humanity, and policy; and draw the important concluſion.

The want of Science, and of Civil Liberty, is the fundamental ſource of thoſe proceedings, where Tyranny and Superſtition, maſked in the ſolemn garb of Law and Juſtice, ſtride horrible with all their ghaſtly train, of confiſcation, torture, and murder. On the want of Science has been erected the monſtrous fabrick of Superſtition. The want of Civil Liberty has enabled Tyrants to ſport with the moſt ſacred rights,—the moſt tender feelings of mankind. Tyranny and Superſtition dictated the barbarous laws, which have brought ſo many innocent perſons to an ignominious death. And the ſame want of Science, and of Liberty, which gave occaſion to the enactment of ſanguinary laws, introduced careleſſneſs into the forms of judicial proceedings, and injuſtice in the meaſure of legal evidence.

Beyond all her other qualifications, then, let Science be revered as an antidote to Superſtition, as a friend to Civil Liberty, and as *the true Philoſopher's Stone*, which in an arbitrary Government tranſmutes the iron rod of a Tyrant into the golden ſceptre of a King, the Father of his People.

APPENDIX.

No. I.

*Superſedere, or perſonal protection from arreſt *, granted to John Earl of Gowrie, June 20. 1600.*

REGE preſente.—Sederunt Domini Seſſionis, Montros Cancellarius, Secretarius, Tungland, Halyrudhous, Cranſtoun Ridell, Kinlos Edzall, Clericus Regiſtri, Clericus Juſticiarii, Advocatus, Quhittinghame, Maircairny, Privie Seill, Fyvie preſes, Dunkeld, Theſaurarius, Blantyre, Fenton Barnis una cum, &c.

Our Soveraign Lord underſtanding that the time of the exerciſe of the office of Theſaurary by umquhille William Earl of Gowrie, Lord Ruthven and Dirleton, he was forced for the honourable defray of his Highneſs maiſt neceſſary affairs touching the weal of this realm, and honour of his Highneſs crown, to burthen himſelf and his houſe with great ſumms of money; and that at the fitting of his laſt accounts made of his intromiſſions with the ſaid office of Theſaurary upon the 10th day of May, the year of God 1583 years, he was found ſuper-expended in the ſumm of L. 48,063 : 4 : 8, as the ſaid compt bears; and that albeit at the end and concluſion of the ſaid compt, his Highneſs ſpecially ordained that the ſaid umquhile Earl ſhould noways have been troubled, or charged with the payment of any allowances taken by him in his ſaid compts, unto the time he had been firſt compleatly paid of the ſaids allowances and ſuper-expences by

* Till the Union, the Scots Peers were liable to be arreſted for debt.

by his Highnefs, yet our foveraign Lord underftanding that fince his deceafe, John, now Earl of Gowrie, Lord Ruthven and Dirleton, his fon, has already payed many fumms of money to the perfons whom for his faid umquhile father took the faids allowances, albeit our foveraign Lord as yet has made no payment to him, nor to his faid umquhile father, of the faids fuper-expences, and that it is not poffible to the faid Earl of Gowrie to make any further payment to his faid umquhile father's creditors, whom for he took the faids allowances, except an certain fpace and time be granted to him to that effect; therefor, our faid foveraign Lord, with exprefs advice, counfal, and deliberation, of the Lords and Senators of his Highnefs's Seffion and College of Juftice, by thefe prefents, decerns, declares, and ordains, that the faid John, now Earl of Gowrie, fhall nowife be called, purfued, charged, nor burthened, with the payment of whatfomever his umquhil father's debts, whereof he took allowance in any of his compts of Thefaurary, for the fpace of an year next to come after the date hereof; that in the mean time his Highnefs may fee the faid Earl fatisfied of the faid fuper-expences refting by his Majefty to his faid umquhile father; and to this effect difcharges the Clerk of Regifter, and his deputes, of all extracting, or giving furth of any extracts of the faids allowances taken by the faid umquhille Earl during his faid office of Thefaurary to whatfomever perfons. And alfo, the faids Lords and Senators of the College of Juftice declares that they will nowife grant nor direct any letters nor charges whatfomever, at the inftance of whatfomever party, againft the faid John, now Earl of Gowrie, his cautioners or tenants, upon whatfomever decreets, already recovered, or to be recovered againft them, for payment of any of the faids allowances for the faid fpace of an year next to come; and in the mean time fufpends all letters of horning, poinding, caption, inhibition, and others whatfomever letters, with all arreftments, effect and execution thereof, ufed or

or to be ufed againft the faid John, now Earl of Gowrie, his cautioners or tenants, during the forefaid fpace; and ordains letters to be direct forefaid in form, as effeirs *.

No. II.

Excerpts from the 'Summondis of Treaffoun' againft Robert Logane, eldeft fone to Robert Logane, fumtyme of Reftalrig, and his tutors and curators, on account of the faid deceaft Robert Logane's acceffion to the E. of Gowrie's confpiracy.

Cujus proditionis quamvis nos dictum quondam Robertum Logane de Reftalrig reum effe ignoraremus, ipfe tamen fua damnatus confcientia, ac femper timens ne dictus quondam Jacobus Bour dicte conjurationis confcius rem omnem detegeret, fepius cum dicto Jacobo egit, ut fidem fibi de ea proditione celanda obftringeret, tandemque per dictum Jacobum certior factus quondam Georgium Sprott notarium in Aymouth, tum vifis ipfius quondam Roberti ad dictum quond. Comitem de Gowrie, ea de re literis fcriptis apud Gwnifgrene, priufquam claufe fuiffent pluribus diebus ante patratum fcelus, et poft detectam conjurationem (quod dictus quond. Jacobus Boure literarum prorfus ignarus dicti quondam Georgii opera in legendis fcriptis omnibus ad eum miffis vel pertinentibus utebatur) quafdam etiam dicti quond. Roberti literis fuper ea conjuratione apud dictum Jacobum Boure fortuito vidiffe, quas a dicto quondam Comite de Gowrie, poftquam eas legiffet ad dictum Robertum Logane reportandas, dictus quondam Jacobus Boure retinuerat, ficque conjurationis perfectam notitiam habere ejufdem dictum quondam Robertum confcium effe, et participem intelligere Dictus quondam Robertus Logane de Reftalrig, cum utroque diligentiffime egit, multifque unicuique eorum datis muneribus.

* MS. Acts of Sederunt, vol. 4. June 20. 1600.

muneribus persuasit, ut dictam proditionem pro perpetuo celarent, obtinuitque, ut se vivo nunquam revelaretur, neque prius horrendum illud dicti Roberti Majestatis crimen detectum fuit, quam dictus quondam Georgius Sprott divino, ut apparuit, inspirante numine, ad vindicandam nostram ab improborum calumniis famam, predictam proditoriam conjurationem et dicti quondam Roberti Logane ejusdem reatum multis constantissime confessionibus ultro patefecit, et dicti quondam Roberti literis quas a dicto quondam Jacobo Boure acceperat, prolatis, manifestavit, ac constanti pia et penitenti * ob tam horrendum facinus tam diu celatum morte feliciter confirmavit,' &c.

No. III.

Trial of Thomas Scott, Henry Yair, &c. for treasonably rising in arms, and keeping her Majesty a prisoner, on the night that Riccio was murdered.

I discovered the papers in this appendix, and in the two following numbers, after this work was mostly printed. They are not originals; but there is every reason to believe that they are authentick copies; and, as the original Records of Justiciary for the periods to which these papers relate are missing, I have thought them entitled to a place in this work. They are taken from a volume of manuscripts in the Advocates Library collected by Sir Lewis Stewart of Kirkhill. Sir Lewis was a lawyer of the first eminence in the reign of Charles I. and a man of elegant and cultivated genius. Robert Burnet, Lord Crimond, who was appointed one of the Senators of the College of Justice at the Restoration, in his preface to *Craig de Feudis*, expresses himself thus of Sir Lewis: 'Quo, nemo acutius, tersius, concinnius, et 'majore cum fide unquam actitavit causas.' Sir Lewis Stewart's daughter and heiress was married to Henry third Lord Cardross; and

* Register of Parliament, June 24. 1609.

and of this marriage the present Earl of Buchan and his brothers are descended.

Curia tent primo Aprilis 1566, per Magistrum Thomam Craig Justiciarium-deputatum, nobilis et potentis Dni Archibaldi Comitis Ergadie, Dni Campbell et Lorne, Justiciarii Generalis, S. D. N. regis, et Regine prescript. sectis vocatis et curia affirmata. 1566

Intran.
Thomas Scott * of Cambusmichael, sheriff-depute of Perth.
William Harlaw, } Burgesses of Edinburgh.
John Mowbray, }

ASSYSE.

The Laird of Langtoun, the Laird of Whytelaw, Andro Hamiltoun of Cochna, the Laird of Skirling, Alexander Stewart tutor of Castlemilk, Alexander Home burges of Edinburgh, William Forrester in Leith, Walter Cant ther, Cuthbert Ramsay burges of Edinburgh, William Fouller baillie, James Nicoll baillie, John Hamiltoun merchant, the Laird of Cambusnethan, Alexander Bruce burges of Edinburgh.

William Fouller and James Nicoll baillies protestit, that their passing upon this assyse be na wayes prejudiciall to them nor ther offices in tyme cuming.

* This Thomas Scott and Henry Yair were the only persons who suffered for the murder of Riccio. Keith's Hist. p. 334.

1566 The qlke day the ſaid Thomas Scott, Wm Harlaw, and John Mowbray, wer convict and fyllit be the ſaid aſſyſe of airt and pairt of the unleſum and treaſonable waching, warding, and halding in captivitie, with convocatione of our ſoveran Ladyes leiges, bodin in feir of weir, als weill in ſecreit armour as with jaks, ſteill bonnetts, gunes, piſtolets, ſwords, bucklers, Jedburgh ſtaffis, halberts, and others wapins invaſive, be themſelvis, and others in yr names, of yr cauſeing command, aſſiſtance, devyſing, ſending, and ratihabitione of our ſaid ſoveran Ladyes maiſt nobill perſone within hir maiſt ſecreit chamber of hir pallace of Hallyrudhowſe, immediatelie and continuallie fra the comitting of the crewall and treaſonable ſlaughter of umqll ſecretar David Rizew, qlk wes upon the nynth day of March laſt, bypaſt, to the ſpace 48 hours nixt yrafter, treaſonablie and maiſt awfullie ſtoping hir Hienes to uſe hir libertie in the mean tyme: Lykas, alſo, ſhe hade bin haldin be them in priſon as yit, maiſt treaſonablie and wickitlie, had not bein that be the proviſione of God, ſhe yrafter fred and delyverit hirſelfe furth of yr hands in maiſt ſober and quiet maner under ſilence of nyt, and with greyte haſart of hir lyfe paſt to her caſtell of Dumbar for ſaifetie thereof; and this they did upon ſet purpoſe, proviſioun, and foirthowght fellony, and therfor dome wes given and pronouncit be the mouthe of the Dempſter of the ſd court, at comand of the ſd Juſtice-depute, that the ſd Thomas ſould be hangit while he were deid, drawin, quarterit, and demaneit, as ane traitour, and all his guids, moveable and unmoveable, lands, heretages, a-rents, takis, offices, ſteidings, poſſeſſiones, and uthers whatſomever, to be forfaultit and eſcheat to our ſoverane Ladyes uſe, at her pleaſure *.'

Henrie

* 'Sir Ludovick Steuart of Kirkhill, Advocate, his Collectiones, &c. ex manuſcriptis Roberti Mylne.' MS. Advocates Library, p. 74. There is another MS, copy

*Henrie Yair * delaittit of Treasone following.*

ASSYSE.

Lawrence Symson burges of Edinburgh, John Gilbert goldsmith, Thomas Ewing goldsmyth, Gilbert Scougall, Capt. Robert Lawder, Robert Ker mert. in Edinburgh, Alexander Haistie ther, John Watson mert. ther, James Forret ther, Edward Litle mert. ther, William Andersone candlemaker, Alex^r Bruce in Edinburgh, Allan Dickiesone ther, Wm Rae cutler, Robert Eviot in M^rtoun. 1566

The qlke day the said Henry Yair was convict and fyllit be ane assyse, of airt and part assistance, fortifieing, supplying, ratihabitione, and concealling of the treasonable conspiracie, convocatione, and gaddering of our soveranes leigis, to the number of fyve hundreth persones, boddin in fear of wear, alseweill in secreit armour as with jacks, steill bonnetes, gunes, pistolets, swords, buklers, Jedburgh staves, halberts, and others waipons invasive, and entering therewith treasonablie w^tin y^r Majesties pallice of Hallyruidhous, purposlie to have put violent hands in our soverane Ladyes maist nobill persone, halden and demaneit the samyne at y^r pleasure; and sicklyke, to have slane or otherwise demaneit as they thowght expedient, the Lords of hir Hienes Secreit Counsall and Sessione, and others hir ministers and

copy of Sir L. Steuart's Collection in the Advocates Library, but this is by far the most correct.—The Records of Justiciary, from 10th May 1559, to 2d March 1568, are missing. * Henry Yair had been a priest who had renounced the Catholick religion, and been admitted a retainer of Lord Ruthven's. Keith's History, p. 334.

1566 and officiars being within hir pallace, and in her ſervice for the tyme, and that upon the nynth day of March laſt bypaſt, under ſilence of night, at aught houres at even, or yrby, it being the tyme of parliat current; and for performing this yr maiſt wicked and ungodlie purpoſe, they then maiſt treaſonablie ruſhit and enterit within yr ſaid pallace, tuike the ſamen at yr own hand, reft the keys theirof fra the porters, cloſit the yetis, and made themſelves as principalls and maiſters yrintill, our ſoverane Lady being for the tyme in her maiſt ſecreit chamber yrof att hir quietnes, having na feir nor dreidor of hir ſubjects, to whom hir Grace at all tymes hade been maiſt beneficiall, guid, and merciful, and yr maiſt crewallie, with drawin ſwords, whingers, bended piſtolls, and others wapones invaſive, perſewit and invaidit umqll ſecretar David Riccio, hir Hienes familliar ſervand, yn in companie within hir Hienes chalmer forſaid, and ſlew him treaſonablie and unmercifullie, in preſence of our ſaid ſoverane, and pat violent hands in our ſoverane Ladyes maiſt nobill perſone, in defence and ſaiftie off the ſaid umqll David, held, detainit, and preſſit, the ſamen maiſt awfullie and treaſonablie, till they had comittit ye ſaid ſlaughter in hir preſence, as ſaid is, hir Majeſtie being then great with chyld, givean to hir Hienes occaſioun, throw dreador and diſpleaſure ſhe conſaveit be the ſight of the ſaid crewall ſlaughter, and maner yrof, and be the detaining and thriſting of hir awn perſone in violent manner, as ſd is, to part with hir birth, and immediatelie therafter ſeirchit and ſought the ſds Lords, miniſters, and officiars, being within the ſaid pallace, to have ſlaine them, and ſwa had done, had not bein the pleaſure of God they eſcapit, and ſwa ſeeing themſelves diſappoyntit in yt behalfe through yr evaſioun, at yr pleaſure, in treaſonable maner detainit and held captive the remanent Lords, miniſters, and officiars within the ſaid pallice, fra the ſaid hour

at

at aught while tua hours after midnight y^t ſamen night, continually, upon ſet purpoſe, proviſioun, and foirthowght fellony. 1566

Item, For airt and pairt of the unleſum and treaſonable warding and halding in captivitie, with convocation foreſaid, boding in feir of weir, as ſaid is, be himſelfe, and uthers his complices, of our ſoverane Ladyes maiſt noble perſone, within her ſaid chalmer of hir pallice of Halyrudhous forſaid, immediatelie and continuallie frae the committing of the ſaid crewall treaſonable ſlaughter qlke wes at the tyme forſaid, to the ſpace of fourty-aught hours nixt therafter, treaſonablie and maiſt aufullie ſtoping hir Hienes to uſe hir libertie in the meanetyme; lykeas alſoe, ſhe had bein halden be them in priſone as yit, had not bein that, be the proviſion of God, ſhe therfor fled and delyverit hirſelfe furth of ther hands, in maiſt ſober and quyet maner, under ſilence of night, and with great hazart of hir lyfe, paſt to the caſtell of Dumbar for ſaiftie of hir lyfe, upon ſet purpoſe, proviſioun, and foirthought fellony: And theirfore dome was given and pronuncit be the mouth of the Dempſter of the ſd court, att command of the ſd Juſtice Deput, that the ſd Hendrie ſould be hangit while he were deid, drawin, quarterit, and demaineit, as ane traitor, and all his moveable and unmoveable, lands, heretadges, a-rents, tacks, offices, ſteidings, poſſeſſiouns, and uthers whatſomever, to be forfaltit and eſcheat to our Soverane, to be uſed and diſponed be hir Majeſtie at hir pleaſure *.'

In the Appendix to Keith's Hiſtorical Collection, the following circumſtance is mentioned relative to the murder of Riccio. When

* S. L. Steuart's Collection, p. 75.

1566 When Mary reproached Darnley with the audacious inſult which had been offered to her, he juſtified himſelf by ſaying, that, ſince Riccio grew into favour with her Majeſty, he (Darnley) was neither regarded, nor entertained, nor truſted by her, in the wonted manner; for before that, ſhe uſed to come into his chamber, and paſs the time with him, which now ſhe had not done of a long while: That when he went in to her Majeſty's chamber, ſhe generally had Riccio there as a third perſon, and with whom ſhe uſed to play at cards, after ſupper, till one or two in the morning. And he aſked what fault he had committed, *what failing had come upon him*, that ſhe treated him with ſuch diſdain? The Queen replied, 'That it was not a gentle-'woman's duty to come to her huſband's chamber, but rather 'the huſband to come to the wife's.' And that for this outrage which he had committed, ſhe ſhould be his wife no longer, nor lie with him any more: Nor would ſhe reſt contented till he had as ſorrowful a heart as ſhe felt at that moment.

On the next night, however, which was Sunday the 10th, the Queen being ſtill a cloſe priſoner in her own palace, had occaſion to cajole Darnley; and after long reaſoning between them, ſhe conſented that he ſhould come to her chamber, and paſs the night. When he went down ſtairs, he told the Earl of Morton and Lord Ruthven of what had paſſed between the Queen and him; he then went to his chamber for a while, and . . . . *fell faſt aſleep!* One of his attendants endeavoured, but in vain, to awake him, and he enjoyed his repoſe till ſix in the morning. When Darnley awaked, Lord Ruthven, who had ſlept in an adjoining chamber, ſneeringly aſked him, Why he did not keep his promiſe with the Queen? and underſtanding that the former meant ſtill to go up to her Majeſty's chamber, he ſaid, 'I truſt

'ſhe

'she shall serve you * in the morning, as you did her at night.' 1566
Darnley went up however, and being asked by the Queen, What became of him last night? he answered, He had fallen *dead asleep*. He then offered to lie down beside her, but she declared, that, if he lay down, she would instantly get out of bed.

No. IV.

Confession of the Laird of Ormiston, who was executed for the Murder of Darnley †.

At the Castell of Edinburgh, the 13*th of December* 1573.

The qlke day John Brand minister at Hallyruidhous being send 1573
to John Ormistoune to give him comfort be the promiss of God's word offerit to sinners, and alswa to requyre the said laird to glorifie God in shawing of the trewth, &c.; after lang conference, and prayers made, aboue the space of ane hour, or theirby, the said John Brand minister said unto him, Sir, Though I am trewlie perswadit that the haill trewth ye have shawen me of this matter, yit, because diverse and greater doubts are passit of you, and alse the memorie of men are bot weak, theirfor, gif ye thought guid, I wald certane of they things breifeley that you have spoken were wrytten; wha answerit meiklie, For God's saike doe the samen; wreit even as I shall speike. As I shall answer unto God, with whom I hope this night to supe, I shall declaire unto you the haill, from the begining unto the end of my pairt. *First*, I confess that the Earle Bothwell shew the samen wickit deid unto me, in his awn

* Keith's Hist. Appendix, p. 123. 128.

† Ormistone's trial is not to be found in the Records of Justiciary. His trial and execution are mentioned in Spottiswood's Hist. p. 271. The particulars of his confession coincide with those of John Hay of Talla, and John Hepburn, which are published in Anderson's collections, vol. 2. p. 177. 178.

1573 awn chalmer in the Abbey, on Fryday before the deid wes done, and requyred me to take pairt with him therein, becaufe as he alleaged I wes ane man of activenefs, (alace theirfor!) qre I utterly refuifit, and faid, God forbid! bot, gif it were upon the field, to fight with your Lo. unto the death, I fould not feir my fkinn cutting. Then the faid Earle faid unto me, Tuifhe, Ormiftoune, ye need not take feir of this, for the haill Lords has concludit the famen in Craigmiller, all that wes ther with the Quein, and nane darr find falt with it when it fhall be done. After the qlk I departit hame to Kaitie's, Thomes being fome part feik, I lay doun in my bed, and lay all Saturday therafter for that caufe, beleivand that way to have put aff that evil hour; and fwa I knew na farder of it untill Sonday at night, qr I being in chamber in the Blackfrier-wynd, gangand in ane beltit goun, John Hepburne and John Hay of Talla come unto me, and faid the Quein's (g.) and Lords are paft upe to fie the King, and my Lord is ftandand at the Blackfrier-wynd-fute, and bids you cume to him incontinent; where I layd my goun from me, and tuik ane ryding clock, becaufe I beleivit all had bein weill anewche now agreit, feing they had pafit up to vifit him; and cuming at the firft, I mift the faid Earle, for he had come in upe anuther cloffe to feik me himfelfe, in my awn chamber, and yr he fand my coufing Hob, qm he brought with him, and yrafter met togidder in the mids of the wynd, wha tuike me againe, and we all pafit upe to the Freier yaird, through the flape, whair Pareis and Archie Betoun comit and met us, and faid all wes ready preparit for the fetting of the lunt; and they all inquyrit how it fould be fet to; and, after diverfe fpeakings, I faid, Take ane piece of lunt of thrie or four inch lang, and kindle the ane end of it, and lay to the cauld end, and it wald burn fyne to the train, and fwa will blaw up; after the qlk, the

(Q.)

(Q.) grace pasit hame to. The Earle Bothwell said, Speid, and close all the doores, for they had 13 fals keys of the lodging maide, and givin, as they said to me, be him that aught the house; after the qlke I departit incontinent, and came not nearer, as I shall answer before God, nor the doore; and as I was cuming hame it strake ten hours, wher then I pasit to Jaimes Kaitie's hous, to avoid suspitioun, yt na man sould say I was at the deid doing, for I was an hour and mair in my bed or the blast and crack was. Being inquyrit be the said minister, gif he knew not yt the King was utherwayes handlit be mens handes, for it is comonlie spoken he was brought furth and weirreit? Wha anserit, As I sall answer to my God, I knew nothing but he was blawin upe; and did inquyre the samyn maist dilligentlie at John Hepburne and John Hay, and all that tarreit behind me, wha swore unto me, they never knew nae uther thing bot he was blawin up; and swa I think it was ane work done be God for the punishment of money wickit men, whairof I am ane, and ane great siner before God, for the qlke I ask God mercy. 1573

Thirdly, Being requyrit, gif he knew na farder hereafter? ansrit, At the pasche yrafter, when the bruite begane to ryse upon us, and all cryit, ane vengance upon them that slew the king! It prickit my conscience, and I come to the Earle Bothwell in his chamber, and said to him, What devill is this now, my Lord, yt every body suspectis you of this deid, and cryes, ane vengance for the samen! and few or no uther spoken of bot yow? Aneuther thing yow said to me: Wha ansrit, I sall let you sie sume thing that I had for me; wha then let me sie ane contract subscryvit be four or fyve hand-writtis whilke he affirmit to me was the subscription of the Earle Huntlie, Argyll secretar, and Sr James Balfour, and

1573 alleaged mony mae promisit, wha wald assist, or he were put at; and y^r^after read the said contract, q^l^k, as I remember, conteinit thir words, in effect, That, for samikle it was thought expedient and maist profitable for the commoun wealth, be the haill Nobilitie and Lords undersubscryvand, that sick ane young fooll and proud tirrane sould not reigne nor bear rule over them; and that for diverse causes, and theirfor, that the haill had concludit that he sould be put off by ane way or uther, and whosoever sould take the deid in hand, or do it, they sould defend and fortifie as themselves, for it sould be every ane's action, recknit and halden done be themselves; whilk writting, as the said Earle shew unto me was devysit be Sr James Balfour, subscryvit be them all ane quartur of ane year before the deid was done; after the whilk I never spake to the said Earle of it whill the day he gate his assyse, whaire the said Earle standing at the barr, luiking doun sad lyke, I plukit on him and said, Fye, my Lord! what deivell is this yee are doeand? Your face shows what ye are: hald up yowr face, for God's saike, and luike blythlie; ye might luike swa and you were gangand to the deid: Alace! and wo worth them that ever devysit it! I trow it sall garr us all murne!—wha ansrit me, Had your tongue; I wald not yet it wer toe do: I have ane airt gaite fra it, came as it may, and y^t^ ye will knaw belyve, &c.

Forder, the tyme when my brother was hurt be the Laird of Sefford, word came to me first that they wes slane, and then y^r^ came ane bill from them, and said they wer onley hurt, and wald not die; but ane thing did them more evill then their hurting, to witt, that ane commoune bruite was risen, that I was at the King's slaughter, and theirfor disirit me to get sume guid way to purge myselfe; let it pass na farder, or else ye

ye have done with it; q^lk bill I tuike and gave to the Farle Bothwell, wha tuike it and gave it to the Quein, and ſhe tuike it and read it, and gave it to the Earle Huntlie, y^r preſent, wha read it, and y_rafter turnit unto me, and turnit her back and gave creinge with hir ſhoulder, and paſsit away and ſpake nothing to me. This is the haill thing that I knaw, either befor or theirafter, as I ſhall anſuer to my God, with whom I hope to ſupe. After the q^lk being inquyred, Gife ever the Quein ſpake to me of it at any tyme, or gif he knew what wes the Queens mynd into it? anſrit, As I ſhall anſuer to God ſhoe never ſpake to me nor I to hir of it, nor I knaw nathing of hir part but as my Lord Bothwell ſhew me; for I will not ſpeike bot the trewth for all the gold of the earth, qlk I deſyre yow, guid miniſter, bear record hearof as ye have written, q^lk I pray yow read over to me: Let me alſo ſee it; q^lk I did before Arch^d Dowglaſs conſtabill of the caſtell, and George Towers of Briſto, with uthers divers gentlemen and ſervants being in the chamber; q^lk being done, he ſaid, for God's ſaike, ſit down and pray for me, for I have bein ane greit ſinner utherwyſe, for the q^lk my God this day puniſhes me; for of all men one the earth I have bein ane of the prouddeſt and high myndit, and maiſt filthie of my body, abuſying the ſame dyvers wayes, but ſpecially I have ſhed innocent blood of ane Michael Hunter with my own hands: Allace theirfor! becauſe the ſaid Michael having me lyeing upon my back, haveing ane fork in his hand, myght have ſlayne me gif he pleaſit, and did it not, qlk of all things maiſt greives my conſcience: Alſwa in a raige I hangit a poor man for ane horſe; with mony uther wickit deids; for the q^lk I aſke my God mercy, for its not mervell I have bein wickit, for the wickit companie that ever I have bein in, bot ſpeciallie within thir ſeaven years bypaſt, q^lk I never ſaw twa guid men or ane guid deid, bot all kind

1573

 of

1573 of wickedness; and yit my God wald not suffer me to be lost, and hes drawen me from them as out of hell, and hes given me leasur and space, with guid companie, to repent, for the qlk I thank him, *and is assurit that I am ane of his elect, &c.*

Thir words, with mony mae, cryand continually unto his God even to the very end, cryand, My Lord Jesus! Sweit Jesus, have mercy upon me, as you have had upon uther sinners! in sick sort, yt he was, to the appearance of man, ane of the maist penetent sinners that hes bein sein this lang tyme, and may be comptit ane example of God's mercies to all penetent sinners *.'

The authentick coppie of this I receaved fram Mr Rid Skene, sone to umqll Mr John Skene, sume tyme clerk of counsall, whilke wes amang his umqll father's papers.'

No. V.

Trial of the Earl of Mortoun for the Murder of Darnley.

'Mortoun his forfaltrie.

1581 Curia justiciarie S. D. N. regis tenta et inchoata in pretorio burgi de Edinburgh, primo die mensis Junii, anno Dni millesimo quingentesimo octuagesimo primo, per honorabiles et discretos viros Jacobum Striviling de Keir militem, et magistrum Joannem Grahame justiciarios in hac parte per commissionem S. D. N. regis, ac Dnorum ejus secreti concilii specialiter constitut.

* S. L. Steuart's Coll. p. 73.

ſtitut. ad effectum ſubſcriptum ſectis vocatis, et curia legittime affirmata, &c. 1581

Jacobus Comes de Mortoun, Dns de Dalkeith, &c. accuſatus callumniatus de arte, parte, preſcientia, conſelatione, et non releuatione proditorie murthure quondam nobiliſſimi et chariſſimi Henrici regis Scotorum, patris S. D. N. Regis Jacobi ſexti.

Nomina aſſiſae elect jurat et admiſs ſuper prefato Jacobo Comite de Mortoun, &c. viz.

Colinus Comes Ergadie, Joannes Comes de Montrois, Andreas Comes de Rothes, Jacobus Comes de Glencairne, Hugo Comes de Eglintoun, Alexander Comes de Sutherland, Joannes Dns de Maxwell, Georgius Dns de Seytoun, Jacobus Dns Ogilvie, Jacobus Dns Innermaithe, Hugo Dns Somervell, Alexander Magiſter de Levingſtoun, Alexander Mr de Elphingſtoun, Joannes Gordoun de Lochinvar, Miles, Patricius Hepburne de Wachtoun, Patricius Learmonth de Derſie, Miles, Willielmus Livingſtoun de Kilſyth, Miles.

The whilk day the ſaid James Earle of Mortoun being indyttit and accuſit, that, in the moneths of Januarii and Febrii, in the yeir of God 1566 yeiris, he, accompaniit with James, ſome tyme Earle Bothwell, James Ormiſtoun ſome tyme of that Ilke, Robert, *alias* Hob Ormiſtoun, his father brother, John Hay ſome tyme of Tallo, younger, John Hepburne, callit John of Bowtoun, and divers others his complices, craftelie and ſecretlie conſpirit among them ſelves, conſultit, treatit, devyſit, and maliciouſly concludit the maiſt ſhameful, deteſtable, and unnatural murther and patricide of our ſoverane Lords umqll dearest

1581 dearest father, Henry King of Scotts, lawfull spouse for the tyme to his Hienes's dearest mother, Mary, then Quein of Scotland, and that within the burgh of Ed^r, pallice of Hallyruidhouse, and uthers places therabout; and to the end he myght bring his wicked, filthie, and execrabill attempt at better to pass, he with the remanent persouns afoirnamed, be themselves, y^r servants, complices, and others, in y^r names, of their cawseing command, hounding, sending, partaking, assistance and ratihabitione, upon the tenth day of the sd moneth of Feberwar 1566 years, at twa hours after midnight, or therby, come to the lodgeing besyde the Kirk of Feild, within the said burgh of Ed^r, wher our sd soverane Lords umqll dearest father was lodgit for the tyme, and ther be way of hamesukin, brigancie, and foirthowght fellonie, maist vylelie, unmercifullie, and treasonablie, slew and murtherit him, with Wm Tayliour and Andro Makage, his cubicularis, when as they, buriet in slep, were takeand the nyghts rest, brunt his haill lodgeing forsaid, and raised the samen in the aire be force of gun poulder, qlke a lytle afore was placit and imput be him and his forsaids under the grund, and angular stands, and within the voltis, laich and derne pairts and places y^rof, to that effect, and richt, swa he with the remanent persouns afornamit, marrowis of his mischeife, be themselves, y^r servants, complices, and uthers, in y^r names, of their causing, command, hunding, sending, and airt and pertaking, assistance, and ratihabition, at the tymes forsaids, respective, gave their favor, counsall, and help to the perpetration of the said horrible crymes, and ay sinsyne hes simulate, hid, and conceillit the samen, in maist treasonable and secreit maner, and theirthrow had incurrit the paines of leismagestie, and sould have bein punishit theirfor with all rigour, be tinsall of life, lands, and guids, and be extinctioun of fame, honour, titles, and memorie, conform to the lawis of this realme; lykeas the remanent persouns afoirnamed, his complices

and

and conſpirators with him in their treaſonable impieties, were 1581 already tryed and forfaultit for the ſelf ſame hynous and deteſtable crymes, and for the maiſt part, as they could be apprehendit, had ſufferit maiſt ſhameful deid theirfor, according to y^{r} deſerving, as at mair lenth is contained in the dittay given in anent the premiſſes, with the taikins and probatiouns producit and uſit theirwith; q^{l}kes being read, the ſaid James Earle of Mortoun, and he anſerand y^{r}to, denyit the ſamen, be reaſoun wherof the ſaid Juſtice-deputis referrit the ſamen to the knawledge of the inqueiſt and aſſyſe above written, wha wes reſavit and admittit in preſence of the ſaid Earle, and they being furth of court removed, and ryply adviſit with the ſaid dittay, taikins infallible and maiſt evident, with the probatiouns producit and uſit for verifieing theirof, and y^{r}after inenterand againe in court, they all in ane voyce, be the pronunceing of the mouth of John Earle of Montroſe, chancellar choiſen be the ſ^{d} aſſyſe, fyllit the ſaid James Earle of Mortoun of airt, pairt, foirknawledge, and conceiling of the treaſonable and unnatural murthers forſaids; after the q^{l}ke conviction, the ſaids Juſtice-deputis, be pronunciatioun of Andro Lindſay, Demſter of the ſaid court, adjudgit, and for dome * gave, that the ſaid James Earle of Mortoun ſould be had to ane gibbet beſyde the mercat-croſe of the ſd burgh of Edr, and ther be hangit while he be deid, and y^{r}after drawin, quarterit, and demaneit, as ane traitour; and that all his lands, heretage, offices, poſſeſſiones, tackes, ſteadings, cornes, cattell, actiounes, debtes, obligations, guids moveable and unmoveable, and uthers whatſomever whilkis pertenit to him, ſould and aught appertaine to our ſoverane Lord, and to be applyit to his Hienes uſe, be reaſone of eſcheat of forfaultour, to be uptaken, uſit, and diſponit, be his Hienes at his pleaſur; upon the q^{l}kes premiſſes, Mr Robert

* The ſentence was changed to beheading, and he was privately buried. Spotiſwood's Hiſt. p. 314.

1581 bert Crichtoun of Eliot *, Advocat to our soverane Lord, asked instruments, and acts of Court.—Extractum ex actis † curie Justiciarie antedicte, per me Wm Stewart juniorem, notarium publicum et clericum dicte curie per commissionem S. D. N. regis antedict. specialiter electum et juratum, &c. sub meis signo et subscriptione manualibus.

No. VI.

Expence of burning a Witch, A. D. 1649.

1649 I am indebted for this curious paper to the polite and obliging communication of Mr William Henderson of the Glasshouse, Glasgow, a descendant of Mr Logan of Burncastle, on whose lands the unhappy sufferer lived. The accompt is a voucher of a payment made by Alexander Louddon, factor on the estate of Burncastle, the proprietor being then a minor and infant. It is entered in the factor's books thus:

'Mair for Margarit Dunhome the time sche was in prison, and 'was put to death, 065 : 14 : 4.'

Count gifin out be Alexander Louddon in Lylstoun, in ye yeir of God 1649 *yeiris, for Margrit Dollmoune in Burncastell.*

Item, in ye first, to Wm. Currie and Andrew Gray for the watching of hir ye space of 30 days, inde ilk day, xxx sh. inde . xlv lib Scotts

Item

* Mr Robert Crichton of *Elliock* (for so it should have been expressed) and Cluny, was father to the Admirable Crichton, and to Sir Robert Crichton of Cluny, who is mentioned above in the trial of the Laird of M'Gregor.

† S. L. Steuart's Collection, p. 69.

Item mair to Jon Kinked for brodding of her	vi lib Scotts	1649
Mair for meat and drink and wyne to him and his man . . .	iiij lib Scotts	
Mair for cloth to hir . . .	iij lib Scotts	
Mair for twa tare treis . . .	xl ſh Scotts	
Item mair for twa treis, and ye making of them, to ye warkmen . . .	iij lib Scotts	
Item to ye hangman in Hadingtoun, and fetchin of him, thrie dollores for his pens, is	iiij lib xiiii ſh	
Item mair for meit and drink and wyne for his intertinge	iii lib Scotts	
Item mair fer ane man and twa horſs, for ye fetcheing of him, and taking of him hame agane	xl ſh. Scotts	
Mair to hir for meit and drink ilk ane day, iiij ſh the ſpace of xxx dayes, is	vi lib Scotts	
Item mair to ye twa officers for yr fie ilk day ſex ſhilline aught pennes, is . .	x lib Scotts	

Summa is iiij ſcoir xii lib xiiij ſh

Ghilbert Lauder.
Um. Lauder Bilzuars.

Takin of this above written ſoume twentie-ſeaven pundis Scotis qlk the ſaid umql Margrit Dinham had of her ain.

92 : 14 : —
27 : — : —
65 : — : —

Ddd

INDEX.

INDEX.

A

ADULTERY, Trials for, from p. 312. to p. 319.
Aikenhead, Thomas, tried for blasphemy, p. 322.
Anderson, John, George Clerk and John Ramsay tried for his murder, p. 142.
Appeal, idea that an appeal lies from the Court of Justiciary to the House of Lords, p. 81. 106.
Argyle, Duke of, sits as Justice-General on the trial of Stewart of Aucharn, p. 192.
Argyle, Earl of, sits as Justice-General on the trial of the Master of Forbess, p. 3.
——— prosecutes Mr John Stewart for leasing-making, p. 121.
Armstrong, John, tried for the murder of Sir John Carmichael, p. 130.
Auchmouty, Charles, tried for having committed treason, by engraving a political print, p. 91.

B

Ballentine, claims to be tried by jury, p. 115.
Blair, Alexander, tried for incest, p. 306.
Blasphemy, Thomas Aikenhead, tried for, p. 322.
Borders, lawless state of the Scottish and English, p. 130.
Borthwick, Francis, tried for blasphemy, p. 323.
Bothwell, Francis, Earl of, attempts to seize the King, p. 35.
Bothwell, James, Earl of, present at the murder of Darnley, p. 9.

C

Campbell of Glenure, James Stewart tried for his murder, p. 192.
Carkeitil, John, murders one of the Lords of Session, p. 155.
Carmichael, Robert, schoolmaster, tried for the murder of one of his scholars, p. 175.
Carmichael, Sir John, of that Ilk, John Armstrong tried for his murder, p. 130.
Carnegie, James, of Finhaven, tried for the murder of the Earl of Strathmore, p. 178.
Chislie, John, of Dalry, tried for the murder of Lord President Lockhart, p. 150.
Clark, George, and John Ramsay, tried for the murder of John Anderson, p. 142.

Clergymen; see *Nonjuring*, *Papist*, *Presbyterian*, *Religion*.
Connochar, John, tried for celebrating clandestine marriage, p. 339.
Cornwall, Archibald, tried for attempting to hang up the King's picture on the gallows, p. 63.
Crichton, Mr Andrew, trial of, for declining the authority of the King, and Privy Council, p. 67.

D

Darnley, trial of Douglass for the murder of, p. 7.; and of the Earl of Morton for the same, p. 388.
Dickson, John, tried for parricide, p. 129.
Douglass, Archibald, Parson of Glasgow, tried for the treasonable murder of Henry King of Scots, p. 7.
Douglass, James, Andrew Rutherford tried for his murder, p. 140.
Dow, tried for stealing wine, ale, &c. p. 112.
Drummond, Robert, tried for a defamatory libel, p. 112.
Drysdale, William, tried for incest, p. 307.
Dundas, Robert, of Arniston, saves Carnegie of Finhaven, p. 189. and Mr Henderson, p. 296.

E

Erskine, Sir Thomas, and Sir John Ramsay, relieve King James at St Johnston, p. 29.

F

Falconer, John, tried for using false keys, p. 113.
Falconer, Patrick, George Cumming tried for his murder, p. 169.
Fleming, John, tried for slanderous speeches against the King, p. 69.
Flight, Alexander, tried for insulting the Provost of Cupar, p. 113.
Forbess, the Master of, tried for high treason, p. 1.
Forgery, trial for, p. 282.
Fornication, trial for, p. 320.
Fraser, Captain Simon, (Lord Lovat) tried for high treason, rape, &c. p. 79.
Fraser, Charles, Lord, tried for high treason, p. 75.
Fraser, John, tried for adultery, p. 314.

G

Gardens, breaking of, p. 305.
Gillespie, John, and others, tried for the murder of Major Menzies, p. 163.
Gowry, genealogical anecdotes of the family of, p. 14.
Gowry, John, Earl of, tried for conspiring to murder the King, p. 20.
——————— obtains a supersedere, or personal protection from arrest, p. 373.

Gowry, William, Earl of, ſeizes King James, p. 35.
Graham, John, a Lord of Seſſion, murdered by Sir James Sandilands, p. 155.
Gray, James, tried for the murder of Archibald Murray, p. 146.
Gray, the Maſter of, Chancellor of the Jury who ſat upon Archibald Douglas, p. 11.; genealogical anecdotes of his family, p. 14.; aſſaults King James in the palace of Falkland, p. 36.
Green, Captain Thomas, and his crew, tried for piracy, p. 248.
Guthrie, John, tried for adultery, p. 312.

H

Haitly, Margaret, tried for adultery, p. 317.
Hamilton, family of, next heirs to the Crown, p. 41.
Hamilton, Sir Thomas, King's Advocate, p. 21. 63. 67.
Henderſon, Mr George, merchant's trial for forgery, p. 282.
Home, of Spott, tried and acquitted of the murder of Darnley, p. 13.

I

Impoſtor, of Bargarran, p. 361.
Inceſt, trials for, from p. 306. to 311.
Johnſton, Agnes, tried for the murder of ——— Lamb, a child, p. 138.
Jury, trial by, the various attacks made upon it, from p. 109. to p. 120. p. 174.; privilege of jury's reſtored, p. 189.; and abuſed, p. 243. 244.
Juſticiary, Court of, idea that an appeal lies from this court to the Houſe of Lords, p. 81. 106.

K

Ker, Sir James, tried for celebrating clandeſtine marriage, p. 337.

L

Leaſing-making, trials for, p. 121. 126.
Lockhart, Sir George, Lord Preſident of the Court of Seſſion, John Chiſlie of Dalry tried for murdering him, p. 150.
Logan of Reſtalrig ſits on the trial of Archibald Douglas for the murder of Darnley, p. 13.; genealogical anecdotes of his family, p. 14.; tried for Gowry's conſpiracy, p. 46.; ſummons of treaſon againſt him, p. 375.
Lords of Seſſion, Galbraith, Graham, and Lockhart, murdered, p. 155.
Luſs, Laird of, Laird of Macgregor tried for ſlaughtering his friends, p. 133.

M

Mary, Queen, Thomas Scott and Henry Yair tried for keeping her a priſoner, p. 376.

Macdonald, Archibald, of Barisdale, tried as attainted of high treason, p. 100.
Macgregor, Laird of, tried for slaughtering the Laird of Luss's friends, p. 133.
Macgregor, Malcolm, tried for the murder of John Stewart, p. 229.
Macgregor, Patrick Roy, tried for a number of crimes, p. 136.
Marriage, clandestine celebration of, p. 337. 339.
Mass, trials for saying, p. 328. 335.
M'Iver and M'Allum, tried for the frandulent destroying of ships, p. 262.
M'Leod, Mrs, tried for forgery, p. 282.
Menzies, Major, John Gillespie and others tried for his murder, p. 163.
Morton, Earl of, concerned in the murder of Darnley, p. 6.; seises King James, p. 34.; tried for the murder of Darnley, 388.
Mowbray, David, tried for tumult within burgh, p. 239.
Mowbray, Francis, doom pronounced over his dead body, p. 65.
Murder, trials for, p. 130. 133. 136. 138. 140. 142. 146. 150. 156. 163. 169. 178. 192. 229.
Murdoch, John, tried for adultery, p. 318.
Murray, Archibald, James Gray tried for his murder, p. 146.

N

Niven, John, tried for leasing-making against the Duke of Albany and York, p. 126.
Nonjuring clergymen, trials of, p. 339. 343.

O

Ogilvie, the Jesuit, his remarks upon the mob of Edinburgh which assaulted King James in the Tolbooth, p. 37.; his trial for saying of mass, acknowledging the Papal jurisdiction, declining to answer questions put to him by the Privy Council, &c. p. 328.
Ormistone, Laird of, his confession when executed for the murder of Darnley, p. 382.

P

Papist, p. 36. 240. 328. 335.
Parricide, John Dickson tried for, p. 129.
Pirracy, trials for, p. 248. 262.
Piscatorie, Leonardo, tried for shooting and maiming John Simpson, claims to be tried by jury, p. 114.
Poieret, Elias, John Master of Tarbett, and others, tried for his murder, p. 156.
Presbyterian clergymen, their zeal against carnal impurities, and against witchcraft, p. 310. 358. 360.

Prefcription of crimes eftabliſhed, p. 229.
Print, political, Mr John Thomſon and Charles Auchmouty, tried for cauſing one to be engraved, p. 91.

R

Ramſay, John, and George Clerk, tried for the murder of John Anderſon, p. 142.
Ramſay, Sir John, and Sir Thomas Erſkine, relieve the King at St Johnſton, p. 29.
Religion, crimes againſt, p. 322. 328. 335. 337. 339. 343.
Riot; fee *Tumult*.
Robertſon, Patrick, tried for adultery, p. 313.
Rois, Thomas, tried for publiſhing at Oxford a paſquinade againſt the Scots, p. 70.
Rutherfoord, Andrew, tried for the murder of James Douglas, p. 140.
Ruthven, Mr Alexander, tried for conſpiring to murder the King, p. 20.

S

Sandilands, Sir James, relieves the King, p. 36.; murders a Lord of Seſſion, p. 155.; gets the gift of a Lady's eſtate who was burned for witchcraft, p. 350.
Seſſion, Galbreath, Graham, and Lockhart, Lords of, murdered, p. 155.
Ships, deſtroying of, p. 262.
Skene, James, tried for treaſon, p. 73.
Stansfield, Philip, remarkable anecdote of him, p. 32.
Stewart, James, tried for the murder of Campbell of Glenure, p. 192.
Stewart, John, Malcolm Macgregor tried for murdering him, p. 229.
Stewart, Mr John, tried for leaſing-making againſt the Earl of Argyle, p. 121.
Storey, James, tried for the murder of William Stewart, p. 179.
Strathmore, Earl of, James Carnegie of Finhaven tried for his murder, p. 178.

T

Tannahill, Barbara, tried for inceſt, p. 307.
Tarbet, John, Maſter of, tried for the murder of Elias Poiret, p. 156.
Taylor, Mr Daniel, and twenty-four other clergymen, tried for not praying for King George, p. 343.
Tennent, Francis, tried for a ſeditious paſquinade, p. 61.
Theft, and fornication, tried in one indictment, p. 320.
Thomſon, Mr John, tried for having committed treaſon by engraving a political print, p. 94.
Treaſon, trials for, p. 1. 7. 20. 46. 61. 63. 65. 67. 69. 70. 73. 75. 79. 91. 100.
Tumult within burgh, David Mowbray tried for, p. 239.

W

W

Wallace, Mr John, tried for ſaying maſs, p. 335.
Weemyſs, and Young, claim to be tried by jury, p. 115.
Wilſon, James, tried for inceſt, p. 306.
Witchcraft, trials for, from p. 347. to p. 370.
Witch, accompt of expences of burning one, p. 392.

Y

York, James, Duke of, ſits in Privy Council when James Skene emits a treaſonable declaration, p. 73.; John Niven tried for leaſing-making againſt him, p. 126.
Young, and Weemyſs, claim to be tried by jury, p. 115.

FINIS.

[illegible]

525